SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 7, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Moskowitz, Freedman, JJ.

4671 Emelina Collado, Index 117757/05
Plaintiff-Respondent,

-against-

Riverside Park Management, et al.,
Defendants-Appellants,

The City of New York, et al.,
Defendants.

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Curan, Ahlers, Fiden & Norris, LLP, White Plains (Charles B. Norris of counsel), for appellants.

Louis A. Badolato, Roslyn Harbor, for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered on or about October 27, 2010, which, to the extent appealed from, denied defendants-appellants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Viewing the evidence in the light most favorable to plaintiff, and drawing all reasonable inferences in her favor, we conclude that the motion court properly determined that an issue of fact exists whether defendants had notice of an ongoing and

recurring dangerous condition in the area of the accident that they routinely left unaddressed (*see Talavera v New York City Tr. Auth.*, 41 AD3d 135 [2007]).

We have considered defendants' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Gonzalez, P.J., Tom, Andrias, Moskowitz, Freedman, JJ.

5055-
5056 In re Bronx Committee for Toxic Free Schools, et al., Petitioners-Respondents,

-against-

New York City School Construction Authority, et al., Respondents-Appellants.

Index 13800/07

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for appellants.

Weil, Gotshal & Manges, LLP, New York (Christopher D. Barraza and David R. Berz of counsel), for respondents.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered October 28, 2008, which, to the extent appealed from as limited by the briefs, granted the petition to direct respondent School Construction Authority (SCA) to prepare a supplemental environmental impact statement (EIS) pursuant to the State Environmental Quality Review Act (SEQRA) (ECL 8-0101 *et seq.*) with respect to long-term maintenance and monitoring of measures for the remediation of contaminated soil and groundwater at the Mott Haven School Campus site, unanimously affirmed, without costs. Order, same court and Justice, entered on or about November 18, 2009, which granted respondents' motion for

renewal and reargument and adhered to the original determination, unanimously affirmed, without costs.

Respondents' contentions notwithstanding, the long-term monitoring measures, developed and implemented in their entirety after the final EIS was issued in October 2006, constituted "changes proposed for the project" (6 NYCRR 617.9[a][7][i][a]). Given, among other things, the Department of Environmental Conservation's July 2006 directive to SCA to develop a site management plan, which by definition under the applicable Brownfield Cleanup Program (*see* ECL tit 14) regulations includes a long-term monitoring plan (*see* 6 NYCRR 375-1.2[at]; 375-1.6[c][iv]), it is evident that information about long-term monitoring measures was of sufficient "importance and relevance" to warrant the preparation of a supplemental EIS (6 NYCRR § 617.9[a][7][ii][a]).

By failing to make any mention of the need for long-term monitoring in the initial EIS, SCA frustrated the purpose of SEQRA, which is to subject agency actions with environmental impact to public scrutiny (*see* Environmental Conservation Law § 8-0109; 6 NYCRR 617.1[c]). Indeed, there is no record evidence that SCA took the requisite "hard look" at the issue of long-term maintenance and monitoring of remediation measures until 2008,

when it issued its final site management plan (*see Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 231-232 [2007]). This constitutes a failure of the agency's obligations under SEQRA (*see Matter of Pyramid Co. of Watertown v Planning Bd. of Town of Watertown*, 24 AD3d 1312 [2005], *lv dismissed* 7 NY3d 803 [2006]; *Matter of Penfield Panorama Area Community v Town of Penfield Planning Bd.*, 253 AD2d 342, 349 [1999]).

Nor does the fact that SCA was acting under the Brownfield Cleanup Program (BCP) shield the remediation measures from SEQRA scrutiny. BCP remediation measures that "commit the . . . agency to specific future uses or actions" are subject to SEQRA review (6 NYCRR 375-3.11[b][1][i]). The final site management plan provided that the Mott Haven School Campus site could be used for a school campus only, thus committing SCA to a specific site use. In any event, the BCP remediation measures applied only to the BCP area, whereas most of the site was not subject to the BCP and nonetheless was subject to SEQRA review.

Respondents contend that, because SCA was relying on BCP procedures, it could appropriately defer consideration of long-term monitoring measures until the completion of remediation. As noted, however, SCA's participation in the BCP did not exempt the

project's environmental impacts from SEQRA scrutiny, and under SEQRA it was impermissible for SCA to omit a known remediation issue from the EIS with the idea of taking up that issue at a later date (*see Penfield*, 253 AD2d at 349).

We reject respondents' contention, raised in their motion for renewal and reargument, that SCA's development of the final site management plan (SMP), which entailed circulation of a draft for public comment, obviates any need for a supplemental EIS. The SMP is not a supplemental EIS, and respondents have not established that the development of the SMP followed the procedures for the preparation of a supplemental EIS. Since SEQRA procedures must be strictly complied with (*see Matter of King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 347 [1996]), SCA's issuance of the final SMP did not cure the deficiencies in the final EIS.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Tom, J.P., Catterson, Moskowitz, DeGrasse, JJ.

2369N 61 West 62 Owners Corp., Index 107341/09
Plaintiff-Respondent,

-against-

CGM EMP LLC, et al.,
Defendants-Appellants,

The Chetrit Group LLC,
Defendant.

_____

Windels Marx Lane & Mittendorf, LLP, New York (Bruce Bronster of counsel), for appellants.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Christopher Cobb of counsel), for respondent.

_____

Upon remittitur from the Court of Appeals (16 NY3d 822 [2011]), order, Supreme Court, New York County (Debra A. James, J.), entered August 3, 2009, which denied plaintiff's motion for a preliminary injunction, reversed, on the facts and in the exercise of discretion, and the matter is remanded for an appropriate provisional remedy.

Plaintiff, the owner of a residential cooperative apartment building, brought this private nuisance action against the owners and operators of a rooftop bar on an adjacent building alleging that defendants "play or permit to be played music at extremely loud level." On May 26, 2009, plaintiff moved by show cause

order for a preliminary injunction prohibiting the bar's use of the open roof deck as well as the attendant excessive noise. The trial court denied plaintiff's motion on the grounds that, inter alia, plaintiff did not demonstrate a likelihood of success on the merits because "the New York City Department of Environmental Protection [DEP], the agency responsible for enforcing the Noise Control Code, has never issued any violations to [defendants]."

On appeal, this Court reversed and remanded (77 AD3d 330 [2010]). We found that "[i]t is wholly immaterial to maintaining an action for nuisance at common law whether or not DEP, or indeed any municipal authority, has issued noise ordinance violations" (77 AD3d at 334). We further found that the court's failure to enjoin defendants was an abuse of discretion.

Defendants appealed, and the Court of Appeals modified (16 NY3d 822 [2011], *supra*). It found that the failure of any authority to issue a violation of the New York City Noise Control Code does not preclude plaintiff from demonstrating a likelihood of success on the merits (16 NY3d at 823). The Court further found that a provisional remedy is not required as a matter of law and remitted to this Court for the exercise of its discretion (*id.*).

Accordingly, we now find that the facts of this case as

detailed in our prior decision (77 AD3d 330 [2010], *supra)* indicate that a preliminary injunction should issue, and we remand to Supreme Court to fashion a provisional remedy consistent with the opinion.

All concur except Tom, J.P. who dissents in a memorandum as follows:

TOM, J.P. (dissenting)

I do not share the majority's view that plaintiff established grounds for preliminary relief or that Supreme Court thereby abused its discretion in denying plaintiff's application for a preliminary injunction. Plaintiff has not made the requisite showing of entitlement to a provisional remedy. The primary evidence of the noise level emanating from defendant's establishment allegedly creating the nuisance was based on the affidavit of plaintiff's acoustical expert. The methodology of the expert in measuring the sound level was questionable and not in compliance with standards approved by the Commissioner of Environmental Protection (Administrative Code of City of NY § 24-204; § 24-206[b]). The expert failed to address these concerns at the hearing on May 26, 2009. Further, plaintiff failed to explain why it lacks an effective administrative remedy and, particularly, why it failed to take any steps in pursuit of available legal redress for an "unreasonably loud and disturbing" noise condition that continued over an extensive period of time. Nor has plaintiff offered any excuse for its delay in seeking

injunctive relief for nearly a year after the condition complained of arose, in contradiction of its claim that immediate relief is required.

Accordingly, I would deny the application for preliminary injunctive relief.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Mazzarelli, J.P., Friedman, Renwick, Richter, JJ.

3842N Invar International, Inc., et al., Index 650628/10
Petitioners-Respondents,

-against-

Zorlu Enerji Elektrik Üretim
Anonim Şirketi,
Respondent-Appellant.

_____

White & Case LLP, New York (Francis A. Vasquez, Jr. of counsel), for appellant.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Moses Silverman of counsel), for respondents.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered July 23, 2010, which granted the petition barring foreclosure pending arbitration, unanimously affirmed, without costs.

Service of the petition was not mandatory under the Hague Convention on the Service of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (20 UST 361, 658 UNTS 163 [1965]) (*see* Fed Rules Civ Pro rule 4[f][1]; *Kwon v Yun*, US Dist LEXIS 7386, *7, 2006 WL 416375, *2 [SD NY]; *see also Volkswagenwerk AG. v Schlunk*, 486 US 694 [1988]). Based on a showing of impracticability of service under the circumstances, the court properly directed alternative service pursuant to CPLR

311(b) (*see e.g. David v Total Identity Corp.*, 50 AD3d 1484, 1485 [2008]).

The court's directive to serve respondent's counsel in the underlying arbitration was reasonably calculated to provide respondent with sufficient notice (*see e.g. In re Potash Antitrust Litig.*, 667 F Supp 2d 907, 931-932 [ND Ill 2009]). Moreover, respondent's presence in New York during negotiations for the loan agreement, during which respondent allegedly made misrepresentations that are central to the underlying dispute, was a sufficient basis to establish personal jurisdiction pursuant to CPLR 302(a)(1) and (2) (*see Reiner & Co. v Schwartz*, 41 NY2d 648 [1977]).

The preliminary injunction was not an improvident exercise of discretion. Petitioners claim an ownership interest in the subject property (two power plants in Moscow, Russia), and that the interest would be foreclosed upon without injunctive relief. The "award to which the applicant may be entitled may be rendered ineffectual without such provisional relief" (CPLR 7502[c]).

Moreover, applying the traditional three-pronged analysis, petitioners were able to show a likelihood of success on the merits by demonstrating that their claims have prima facie merit, including a claim for fraudulent inducement based on alleged

misrepresentations regarding respondent's affiliation with the intended lender in connection with the negotiation of a loan agreement (*see Matter of Witham v Finance Invs., Inc.*, 52 AD3d 403 [2008]). The court properly concluded that petitioners faced irreparable harm and that the balance of the equities was in their favor.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Saxe, J.P., Friedman, Catterson, Acosta, Richter, JJ.

4173-
4173A Georgia Malone & Company, Inc.,
Plaintiff-Appellant,

-against-

Ralph Rieder, et al.,
Defendants-Respondents,

CenterRock Realty, LLC,
Defendant.

Index 109524/08

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for appellant.

Lichter Gliedman Offenkrantz PC, New York (Ronald J. Offenkrantz of counsel), for Ralph Rieder, Elie Rieder, Kenneth Gliedman and Fieldstone Properties, LLC, respondents.

Westerman Ball Ederer Miller & Sharfstein, LLP, Uniondale (Michael J. Gelfand of counsel), for Rosewood Realty Group, Inc., and Aaron Jungreis, respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 27, 2009, which, to the extent appealed from, as limited by the briefs, in an action to recover real estate brokerage commissions, dismissed the complaint as against defendant-respondent Ralph Rieder, and the unjust enrichment claim as against all of the defendants-respondents, modified, on the law, to reinstate the unjust enrichment claim as against Ralph Rieder and Elie Rieder, and otherwise affirmed, without

costs. Order, same court and Justice, entered June 10, 2010, which, insofar as appealed from, denied plaintiff's motion to renew, affirmed, without costs.

Plaintiff Georgia Malone & Company, Inc. (MaloneCo) is a licensed real estate brokerage and consulting firm that provides its clients with information with respect to the purchase and sale of properties not yet on the market. MaloneCo and defendant CenterRock Realty, LLC, by its managing member, Ralph Rieder (Ralph), entered into a Confidentiality Agreement in November 2007. That agreement pertained to CenterRock's potential purchase of a group of buildings in midtown Manhattan and required CenterRock to treat all information provided to it by MaloneCo as confidential. In addition, the agreement also required CenterRock to pay MaloneCo a commission fee of 1.25% of the sale price of the property. The agreement was signed by "Ralph Rieder of CenterRock Realty LLC" and MaloneCo. The purchaser is defined as "CenterRock Co" and its affiliates, and the signature line denotes CenterRock Realty as the "company," with Ralph Rieder as the "contact name."

After the agreement was signed, MaloneCo provided CenterRock, Ralph, Elie Rieder (Elie), an officer of CenterRock, and defendant-respondent Kenneth Gliedman, an attorney for

CenterRock, with confidential information concerning financial projections, due diligence materials, and other information and advice relating to all aspects of the subject property and potential transaction. In December 2007, CenterRock entered into a contract of sale with the property owners to purchase the property for $70,000,000. CenterRock had a 25-day period to perform due diligence investigations, during which time it could terminate the deal without penalty. The property owners agreed to extend the due diligence period an additional 21 days, to January 25, 2008. During the due diligence period, MaloneCo continued to collect, create and provide CenterRock, Ralph, and Elie with confidential information regarding the property. On January 25, 2008, the final day of the due diligence period, CenterRock terminated the transaction.

MaloneCo alleges that it provided valuable, confidential information to CenterRock, Ralph, and Elie, who then sold the information to defendants-respondents Rosewood Realty Group Inc., a fellow brokerage firm, and Aaron Jungreis, a broker at Rosewood, for $150,000. MaloneCo further contends that from about November 2007 through January 2008, Ralph continually affirmed CenterRock's interest in completing the transaction. The complaint specifically alleges that Ralph sent an e-mail to

MaloneCo stating that he and Elie were working together to complete the transaction. However, during this time Ralph allegedly delayed the negotiations and tender of the down payment in order to provide himself, CenterRock, and Elie with more time to secure an equity partner to participate in the transaction. It is further alleged that shortly after CenterRock terminated the contract, Elie sold MaloneCo's confidential information to Rosewood and Jungreis.

MaloneCo also contends that Rosewood and Jungreis then provided this information to its client, who in turn purchased the property resulting in a sizeable commission for Rosewood and Jungreis.[1] According to the complaint, Ralph and Elie benefitted, separate and apart from any benefit to CenterRock, by profiting from the ultimate sale of the property, in addition to the $150,000 received for selling the confidential information. MaloneCo further alleges that Gliedman was the attorney for both CenterRock and the ultimate purchaser of the subject property, with his only benefit being collection of his fees. Defendant-respondent Fieldstone Properties, LLC (FSP), a corporation in

[1] The complaint does not allege that Rosewood and Jungreis knew that MaloneCo had not been compensated by CenterRock or the Rieders.

which Ralph and Elie are officers, also is alleged to have unjustly benefitted from MaloneCo's work product.

MaloneCo commenced this action alleging breach of contract, breach of confidentiality, quantum meruit, and unjust enrichment against Ralph Rieder individually, and unjust enrichment against the remaining defendants-respondents. Defendants-respondents moved to dismiss the complaint for failure to state a cause of action and the court granted the motions in their entirety.

The motion court properly dismissed the contract claims against Ralph, individually.[2] It is well established that officers or agents of a company are not personally liable on a contract if they do not purport to bind themselves individually (*PNC Capital Recovery v Mechanical Parking Sys.*, 283 AD2d 268, 270 [2001] *lv dismissed* 96 NY2d 937 [2001], *appeal dismissed* 98 NY2d 763 [2002]; *see also Salzman Sign Co. v Beck*, 10 NY2d 63, 67 [1961]). Ralph is listed only as the "contact" and CenterRock is listed as the "company" on the signature block of the agreement. The agreement specifically states it is between "Ralph Rieder of CenterRock" and MaloneCo. Indeed, Ralph only signed the contract once, rather than signing twice, which is the general practice

[2] The motion court denied CenterRock's motion to dismiss in its entirety and CenterRock is not a party to this appeal.

when an individual wishes to be personally bound (*Salzman Sign Co.*, 10 NY2d at 67).

The unjust enrichment claim against Ralph and Elie, in their individual capacities, should not have been dismissed. Unjust enrichment is a quasi-contract theory of recovery, and "is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned" (*IDT Corp v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). The plaintiff must show that the other party was enriched, at plaintiff's expense, and that "it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*,16 NY3d 173, 182 [2011] [internal quotation marks and citation omitted]). Further, although privity is not required for an unjust enrichment claim (*Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007]), a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part (*Mandarin Trading*, 16 NY3d at 182).

Prior cases from this Court and the other Departments have held that an unjust enrichment claim can only be sustained if the services were performed at the defendant's behest (*Ehrlich v*

Froehlich, 72 AD3d 1010, 1011 [2010]; *Seneca Pipe & Paving Co., Inc. v South Seneca Cent. School Dist.*, 63 AD3d 1556 [2009]; *Joan Hansen & Co v Everlast World's Boxing Headquarter's Corp.*, 296 AD2d 103, 108 [2002]; *Kagan v K-Tel Entertainment,* 172 AD2d 375, 376 [1991]). The Court of Appeals in *Mandarin Trading* held that the plaintiff was unable to establish an unjust enrichment claim where the "pleadings failed to indicate a relationship between the parties that could have caused reliance or inducement" (*Mandarin Trading*, 16 NY3d at 182). The Court did not discuss the "behest" language in *Kagan* and its progeny. However, there was no reason for the Court to do so because there was no claim of a contract between the plaintiff and the defendant, nor was there a claim of any direct contact such that the plaintiff could have acted at the defendant's behest. In any event, even under the language of *Mandarin Trading*, the unjust enrichment claim survives against Elie and Ralph.

MaloneCo contends that Ralph personally affirmed his, CenterRock's, and Elie's interest in completing the transaction and assured MaloneCo that it would receive its commission, even if the deal was not completed. Based on these assurances, MaloneCo continued to collect and provide Ralph, Elie, and CenterRock with the confidential information. Thus, MaloneCo has

sufficiently pleaded that there was direct contact and a relationship with Ralph and Elie that could have caused reliance or inducement (*cf*. *Mandarin Trading*, 16 NY3d at 182-183).

In contrast, no such allegations exist as to FSP, Gliedman, Rosewood, and Jungreis. MaloneCo dealt solely with CenterRock, Ralph, and Elie. It is not enough, as the dissent suggests, that CenterRock, Ralph, and Elie had a connection with the remaining defendants-respondents. MaloneCo does not allege that it relied upon any statements or actions of FSP, Gliedman, Rosewood or Jungreis, that those defendants acted in any way to induce MaloneCo to provide the confidential information, in the first instance, to CenterRock, Ralph, and Elie, or even that those defendants knew MaloneCo had not been paid. It also is not sufficient, as the dissent contends, to merely show that FSP, Gliedman, Rosewood and Jungreis were aware of MaloneCo's existence. A mere awareness standard would result in liability for anyone who simply knew of the plaintiff's existence. Similarly, the dissent also incorrectly contends that an unjust enrichment claim can exist solely because defendants may have profited, in one form or another, from plaintiff's work. Such a broad reading improperly expands the claim of unjust enrichment, absent any contention that defendants induced plaintiff to do the

work. It is this lack of reliance or inducement that is fatal to the unjust enrichment claim against the third parties, and not merely the lack of behest language, as the dissent suggests in its opening paragraph.

Contrary to the dissent's suggestion, we see no contradiction between our holding and the language of the Court of Appeals in *Mandarin Trading*, nor do we see any internal inconsistency in the Court of Appeals' opinion. That case noted that an unjust enrichment claim was deficient without an allegation of a relationship that caused reliance or inducement. The brief reference to one party's "awareness" of the other party's existence in *Mandarin Trading* was used simply to highlight the fact that, in that case, the two parties had no connection whatsoever and thus their relationship was "too attenuated." It was not intended, as the dissent suggests, to create an entirely new pleading rule, overruling existing Appellate Division precedent. The dissent's response to *Kagan* and its progeny is to announce that those cases were overruled by the Court of Appeals in *Sperry* and *Mandarin Trading*. The holding in *Sperry* stated that privity is not required (8 NY3d at 215), a principle which is not in dispute here. However, the dissent fails to adequately explain why the Court of Appeals, in either

case, would have overruled controlling precedent from this Department, as well as the other Departments, without a clear indication that it was doing so[3].

Finally, the dissent continues to maintain, despite the clear language to the contrary in this opinion, that we are requiring privity. Requiring plaintiff to plead facts from which it can be inferred that there was a relationship that involved reliance or inducement is not the same as requiring privity. We are not, as the dissent contends, applying too high a standard for a CPLR 3211 motion. Nor are we requiring plaintiff to plead the minutia of its unjust enrichment claim. Rather, we are properly requiring MaloneCo to plead facts that are within its knowledge, and from which a relationship that caused reliance or inducement could be inferred.

To the extent that MaloneCo asserts an action in quantum meruit against Ralph individually, it was properly dismissed. In

[3] The dissent's contention that we are requiring the Court of Appeals to name every case it is overturning is a misreading of this majority opinion. It is worth noting that neither the briefs filed in the Court of Appeals in *Mandarin Trading*, nor the opinion itself focuses on the precedents we are citing here, and thus we adhere to our position that *Mandarin Trading* did not necessarily overrule those cases. In any event, the difference between our view and that of the dissent turns on the interpretation of a few sentences in *Mandarin Trading*, which ultimately resulted in dismissal of the unjust enrichment claim.

order to establish a quantum meruit claim, plaintiff must show "the performance of services in good faith, acceptance of the services by the person to whom they are rendered, an expectation of compensation therefor, and the reasonable value of the services" (*Freedman v Pearlman*, 271 AD2d 301, 304 [2000]). Here, there is no allegation that the services performed by MaloneCo were requested by Ralph or performed on his individual behalf.

Denial of MaloneCo's motion to renew also was proper as it did not submit any new material demonstrating Ralph Rieder's intent to be personally bound under the contract (*see* CPLR 2221[e][2]).

All concur except Saxe, J.P. and Acosta, J. who dissent in part in a memorandum by Acosta, J. as follows:

ACOSTA, J. (dissenting in part)

I respectfully dissent because I believe that my colleagues are in error and ignore clear Court of Appeals precedent in upholding the dismissal of the unjust enrichment claims against FSP, Gliedman, Rosewood and Jungreis. Specifically, while the majority would require that plaintiff plead that the property be provided in the first instance at the behest of the defendants, I believe that it was sufficient that plaintiff alleged that defendants *knew* at all times that they were using information that had been wrongfully obtained by the individuals that sold it to them.

It is well established that to successfully plead unjust enrichment "[a] plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks omitted]; *see also Wiener v Lazard Freres & Co.*, 241 AD2d 114, 119 [1998] ["[a] cause of action for unjust enrichment is stated where plaintiffs have properly asserted that a benefit was bestowed . . . by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs therefor"]

[internal quotation marks omitted]). A claim for unjust enrichment "is undoubtedly equitable and depends upon *broad* considerations of equity and justice" (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972], *cert denied* 414 US 829 [1973] [emphasis added]).[1] It is "[d]uty, and not a promise or agreement or intention of the person sought to be charged, [that] defines it" (*Bradkin*, 26 NY2d at 197, quoting *Miller v Schloss*, 218 NY 400, 407 [1916]). Where a plaintiff's property is wrongfully misappropriated by a third party and given to a defendant, the defendant who receives the misappropriated property has a duty to return it to the plaintiff and may be compelled on equitable grounds to compensate the plaintiff (*see Carriafielio-Diehl & Assoc., Inc. v D&M Elec. Contr.*, Inc., 12

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[1] As the Court of Appeals has explained:

> "A *quasi* or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. In truth it is not a contract or promise at all. It is an obligation which the law creates, in the absence of any agreement, when and because *the acts of* the parties or *others* have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which ex aequo et bono belongs to another." *Bradkin v Leverton*, 26 NY2d 192, 197 [1970] [quoting Miller v Schloss, 218 NY 400, 407 [1916] [emphasis added]).

AD3d 478, 479 [2004]; *Wolf v National Council of Young Israel*, 264 AD2d 416, 417 [1999]; *Nakamura v Fujii*, 253 AD2d 387, 390 [1998]; *Cohn v Rothman-Goodman Mgt. Corp.*, 155 AD2d 579, 581 [1989]). In order to adequately plead an unjust enrichment claim there must be allegations of a connection between the plaintiff and the defendant that is not too attenuated; that is, the parties must have something akin to specific knowledge of one another's existence (*see Mandarin Trading*, 16 NY3d at 182 ["Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated"], citing *Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007]; *see also* 26 Lord, Williston on Contracts § 68:5 [4th ed] [noting that one of the elements of an unjust enrichment claim is "an *appreciation* or *knowledge* by the defendant of the benefit"] [emphasis added]).

Before *Sperry*, there was a split of authority in New York regarding the extent to which parties needed to be in privity with one another to state a claim for unjust enrichment (*see e.g.* NY PJI 4:2, Comment ["There is a split of authority as to whether privity is required in a claim seeking damages for unjust

enrichment."]; *Bildstein v MasterCard Intl., Inc.*, 2005 WL 1324972, *5, 2005 US Dist LEXIS 10763, *15 [SD NY 2005] ["Whether New York law imposes a nexus requirement to state a claim for unjust enrichment is unsettled."]). For example, one case in this Department essentially discarded the privity requirement (*see e.g. Cox v Microsoft Corp.*, 8 AD3d 39, 40 [2004]), while another line of cases in this Department held that the parties needed to be in direct privity with one another to plead unjust enrichment (*see e.g. Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 108 [2002], quoting *Kagan v K-Tel Entertainment*, 172 AD2d 375, 376 [1991]).[2] In *Sperry* and *Mandarin Trading*, I believe that the Court of Appeals resolved this split and staked out a middle ground between the two different schools of thought. Indeed, after *Sperry* and *Mandarin Trading*, a party is now allowed to bring a claim for unjust enrichment under a loosened privity standard. Where a party bringing such a claim pleads that the other party had knowledge or awareness of its existence, the claim should not be dismissed for lack of privity.

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[2] There was also a division among the federal courts applying New York Law in diversity actions, as noted in *Bildstein* (2005 WL 1324972, *5, 2005 US Dist LEXIS 10763, *15).

In *Sperry*, the Second Department affirmed Supreme Court's decision dismissing Sperry's claim for unjust enrichment on the ground that plaintiff was not in privity with the defendants (26 AD3d at 489). In so doing, the Second Department noted its disagreement with this Department's decision in *Cox v Microsoft Corp.* (8 AD3d 39, 40 [2004]). It also cited, inter alia, this Department's decision in *Kagen* (172 AD2d at 376) to support its narrow view of privity (26 AD3d at 489). Notably, some of the cases cited by the Second Department in *Sperry* adopted the element being advanced by the majority here – namely, that services be performed at the defendant's "behest" (*see e.g. Outrigger Constr. Co. v Bank Leumi Trust Co. of N.Y.*, 240 AD2d 382, 384 [1997] *lv denied* 91 NY2d 807 [1998]). The Court of Appeals affirmed the Second Department's decision; however, the Court "agree[d] with Sperry that a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment" (*Sperry*, 8 NY3d at 215).[3] In light of the fact that

[3] The majority's claim that the Court of Appeals in *Mandarin Trading* did not discuss the "behest" requirement in *Kagan* because the requirement did not apply in that case is perplexing. Of course, such language would have had direct application in that case. It could certainly have been used as the basis for denying the plaintiff's claim. The Court of Appeals could well have adopted the general rule articulated by the majority and applied it to the facts in *Mandarin*. Yet, the Court chose not to do so.

the Court of Appeals saw fit to lay out an alternative rationale from the one articulated by the Second Department and that the Court did not adopt the "behest" requirement in the various opinions cited by the Second Department's opinion, I believe that the Court of Appeals has overruled the line of cases adding the "behest" requirement as an element of unjust enrichment (*see e.g. Joan Hansen & Co.*, 296 AD2d 108, quoting *Kagan*, 172 AD2d at 376 [1991]).[4] I also believe that *Cox* (8 AD3d 39) is no longer good law.

Contrary to the majority's position, to plead unjust enrichment, there is no requirement that the property be provided

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I believe that the Court of Appeals unwillingness to apply the "behest" requirement in *Mandarin Trading* and *Sperry* is more consistent with my view – that the "behest" requirement is no longer good law – than with the majority's position. In short, if the Court believed that the "behest" language was good law, it would have said so, even if it chose not to apply it.

[4] The majority justifies its defense of *Kagan* on the ground that the Court of Appeals did not give a "clear indication that it was [overruling controlling precedent from this Department]." We believe, however, that Judge Jones' opinion was crystal clear in rejecting the behest requirement. The Court of Appeals does not have to name every case that it is overturning; it merely has to articulate a new rule that is logically inconsistent with this Court's prior precedent.

in the first instance at the behest of the defendant[5] (*see Monex Fin. Servs., Ltd. v Dynamic Currency Conversion, Inc.*, 62 AD3d 675, 676 [2009] ["[T]he complaint sufficiently pleaded a cause of action sounding in unjust enrichment. The latter cause of action did not plead a quantum meruit theory; therefore, the plaintiffs were not required to plead that they performed services for the

[5] A cause of action for unjust enrichment has traditionally been understood to reach situations beyond the scope of a claim brought for quantum meruit. Unsurprisingly, the case cited by *Kagan* in support of the "behest" element was an action for quantum meruit (*see Citrin v Columbia Broadcasting Sys.*, 29 AD2d 740 [1968]). The majority's insistence on limiting unjust enrichment claims to those where the benefit was conferred at the behest of the defendant, after the Court of Appeals did away with that requirement in *Sperry*, virtually collapses the distinction between claims for quantum meruit and those for unjust enrichment. Troublingly, by limiting the scope of unjust enrichment to such a significant degree, the majority would preclude a party from recovering for, inter alia, a mistake. In so doing, the majority runs roughshod over well-established principles of American law, the origins of which can be traced to Roman times (*see* Corbin, *Quasi-Contractual Obligations*, 21 Yale L J 533, 543 [1912] ["Where money is paid under the mistaken belief that it was due, when in fact nothing was due, an action will lie to recover it. This was true also under the Roman law and it is true under all the civil codes based on the Roman law."] [footnotes omitted]). Moreover, the majority is adding an element to the unjust enrichment cause of action that 1) is nowhere to be found in the Court of Appeals precedents and 2) cannot be reconciled with existing precedent (*see Mandarin Trading*, 16 NY3d at 182 [articulating three elements of an unjust enrichment claim, none of which included a requirement that the benefit be conferred at the defendant's "behest"]).

defendants"] [citations omitted];[6] *Aetna Cas. & Sur. Co. v LFO Constr. Corp.*, 207 AD2d 274, 277 [1994] ["The unjust enrichment claim does not require that the party enriched take an active role in obtaining the benefit."]; *see also T.D. Bank, N.A. v JP Morgan Chase Bank, N.A*, 2010 WL 4038826, *5, 2010 US Dist LEXIS 109471, *19-20 [ED NY 2010] [The claims for restitution asserted by Chase require proof of no other, independent relationship between the parties . . . Accordingly, Chase's failure to allege privity or direct dealings between itself and Kahan does not defeat its claims for . . . unjust enrichment."]; *Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 117 [1990], *lv denied* 77 NY2d 803 [1991] [noting that "[i]t does not matter whether the benefit is directly or indirectly conveyed" in addressing an unjust enrichment claim where the parties had direct contact with one another]; *Dreieck Finanz AG v Sun*, 1989 WL 96626, *4, 1989 US Dist LEXIS 9623, *13 [SD NY 1989] [in applying New York law to adjudicate an attachment claim based on an unjust enrichment theory where some of the parties knew of

[6] Notably, in arriving at the same conclusion that I have reached respecting the relationship between quantum meruit and unjust enrichment, the Second Department rejected Supreme Court's application of *Kagan* in an action for unjust enrichment (62 AD3d at 676).

each other, the District Court noted, "[n]or is it necessary for plaintiff and defendant to have had direct dealings with one another."]).[7] It was sufficient that plaintiff alleged that defendants *knew* at all times that they were using for their own benefit information that had been wrongfully obtained by the very individuals that sold it to them at a significant[8] discount (*Mandarin Trading*, 16 NY3d at 182 ["Mandarin's unjust enrichment claim fails for the same deficiency as its other claims — the lack of allegations that would indicate a relationship between the parties, *or at least an awareness* by Wildenstein of Mandarin's existence."] [emphasis added]; *Davenport v Walker*, 132 App Div 96 [1909];[9] *see also Mason v Prendergast*, 120 NY 536

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[7] The facts of this case are more fully elaborated in *Dreieck Finanz AG v Sun*, 1990 WL 11537, 1990 US Dist LEXIS 1438 [SD NY 1990].

[8] The majority maintains that my standard would "expand[] the claim of unjust enrichment." On the contrary, the majority's reading would narrow the claim in a way that countless federal and state courts have rejected (*see* 26 Lord, Williston on Contracts § 68:5 [4th ed]).

[9] In *Davenport*, the plaintiff John S. Davenport, as receiver of the Bank of Staten Island, brought an unjust enrichment action against defendants Norman S. Walker, Jr., and another, doing business as Walker Bros. The complaint alleged that Ahlmann, the cashier of the Bank of Staten Island, drew a cashier's check upon the bank and delivered it to the defendants, who received it in

[1890] [holding that where a person that has a specific fund belonging to another, "who is entitled thereto on demand, delivers the money, without the consent of the owner, to a third person, and the latter refuses to pay it over on demand, an action . . . is maintainable against him, and for the purpose of relief it is not necessary to join as plaintiff the one who made the delivery."]; *RenerGlobe, Inc. v Northeast Biofuels, LLC*, 24

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part-payment of his indebtedness (132 App Div at 98). Ahlmann lacked the bank's approval to take such action. The complaint further alleged that defendants accepted the check that Alhman tendered "with notice and knowledge that the said funds were the funds of the said bank" (*id.* [internal quotation marks omitted]). The Court allowed the action to proceed, holding:

> "It may be conceded, in view of Ahlmann's relations to the bank, that the mere fact that the check was a cashier's check would not be sufficient to put the defendants upon notice that funds of the bank were being used to pay his individual debt. But this complaint alleges further that at the time that the defendants applied this $40,000 in part payment of Ahlmann's indebtedness to them they accepted such part payment '*with notice and knowledge that the said funds were the funds of the said bank.*' . . . If the defendants *knew* that Ahlmann was paying his debts with the bank funds, equity and good conscience would forbid them to retain the same. Under this allegation the plaintiff is not limited to any inference that may be drawn from the form of the check, but may prove full and complete notice and knowledge, actual or constructive, that the money which defendants received was money of the bank which Ahlmann had no right to use" (*id.* at 413-414 [emphasis added and citations omitted]).

Misc 3d 1212[A], 2009 NY Slip Op 51430[u] [2009] [upholding a complaint alleging that the new owners of a facility received valuable permits and contracts as a result of the plaintiff's work on behalf of the previous owner, and that it would be unjust and inequitable for the new owner and operators of the facility to retain such services and benefits without compensating the plaintiff]). The language in *Mandarin* that "the pleadings failed to indicate a relationship between the parties that could have caused reliance or inducement" focused on the nature of the enrichment conferred upon the defendant, that is, the "equity" of the enrichment (16 NY3d at 182). That language did not address the necessary nexus between the parties.[10] The majority's interpretation of the "reliance" or "inducement" language in

[10] Indeed, the Court of Appeals language in *Mandarin* echoes the language of this Court's majority opinion in *Mandarin* (65 AD3d 448 [2009], *affd* 16 NY3d 173 [2011]. Notably, the majority quoted *Paramount Film Distrib. Corp.* (30 NY2d at 421), for the proposition that "[t]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Mandarin Trading*, 65 AD3d at 451). I believe that the majority's link between the lack of reliance and inducement on the part of Mandarin and the "equity" requirement of an unjust enrichment claim supports my view that the language respecting "reliance or inducement" in the Court of Appeals opinion was similarly tied to the "equity" requirement — and not the "privity" requirement, as the majority maintains.

Mandarin essentially transforms the language in the preceding paragraph, establishing "awareness" as a sufficient basis to state a cause of action (*id.*), into mere surplusage.[11] Judge Jones's opinion should not be read to include purposeless phrases that serve as nothing more than mere ornamentation. Moreover, I do not believe that the Court of Appeals was so careless as to write what would amount to, under the majority's interpretation, an internally inconsistent opinion.[12] Accordingly, I reject the majority's use of the "reliance" or "inducement" language in *Mandarin* to reintroduce what amounts to a direct privity requirement to plead a cause of action for unjust enrichment.

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[11] Frankly, I fail to understand how such a requirement could be met without also requiring that the parties have a direct relationship with one another — something the Court of Appeals has said in *Mandarin* is unnecessary. To wit, the interaction that is required to cause a person to rely upon another person or induce a person to take some action necessitates more than mere awareness of the other parties' existence.

[12] That is, I do not believe that Judge Jones's opinion suffers from any internal inconsistency. Rather, I believe that the majority interprets his opinion in a way that makes it internally inconsistent.

Here, plaintiff factually and pointedly alleges, in the absence of discovery, that defendants misappropriated its confidential information and benefitted from its property. Specifically, it alleges that it had provided valuable, confidential information to CenterRock and Ralph Rieder, and that Rieder and his affiliated defendants wrongfully sold the information to defendants Rosewood and Jungreis, who in turn used it to obtain a sizeable commission. Plaintiff further alleges in its complaint that "defendants Rieder, CenterRock, Elie, Gliedman, FSP, Rosewood and Jungreis *knew at all times* that [plaintiff] had performed the aforementioned work, labor and services and had supplied the aforesaid information with the expectation that [plaintiff] would be compensated therefore in the event that an agreement was reached to purchase the Property" (emphasis added). [13] Because defendants allegedly knew of the benefit that plaintiff conferred upon them, the connection between the parties is not too attenuated (*cf. Manderin,* 16 NY3d

[13] The majority seemingly misunderstands the nature of plaintiff's claim, as plaintiff has alleged more than it was on the unfortunate end of a business deal that may have involved some unsavory parties.

at 182). Indeed, unlike in *Mandarin Trading*, the parties here were not total strangers to one another. Assuming the truth of plaintiff's assertions as we must on a motion to dismiss (*see Fischbach & Moore v Howell Co.*, 240 AD2d 157 [1997]), defendants should not be able to profit from what they allegedly knew to be the wrongful dissemination of plaintiff's confidential proprietary information, while plaintiff receives nothing for its work and valuable work product[14] (*cf. Joan Briton*, 36 AD2d at 466 ["The defendant deRham was not merely the innocent recipient of an unsolicited gift. It is indicated that she was intimately involved in every stage of the arrangements, and having benefited there from, ought without any doubt also be liable to the

[14] The contract between CenterRock and MaloneCo obligates the former to pay the latter a commission of 1.25% of the purchase price of a building procured using MaloneCo's information. Rosewood and Jungreis are alleged to have received MaloneCo's Confidential Information for $150,000. Accepting the alleged ultimate purchase price of $68,500,000 as true, MaloneCo would have been paid $856,250 for its information had it contracted directly with Rosewood and Jungreis. This represents a benefit (i.e., a discount) of $706,250 to Rosewood and Jungreis for MaloneCo's information. Such a windfall to defendants who knowingly acquired misappropriated property should not be given legal sanction (*see Joan Briton, Inc. v Streuber*, 36 AD2d 464, 466 [1971], *affd* 30 NY2d 551 [1972] ["A windfall creates a chilling effect"]).

plaintiff for what she received."]).[15]

Saying that these allegations are "conclusory" does not make it so, particularly in the context of a glaring misappropriation of plaintiff's property. The majority wants to raise the CPLR 3211 bar by requiring, in the absence of discovery, that plaintiff not simply allege its claim, but support it with evidence as well. At this stage of the action, however, the information that would satisfy the majority is generally within the knowledge of the defendants alleged to have misappropriated the property. Accordingly, it is extremely unfair and improper, in the context of a CPLR 3211 motion, where "the criterion is whether the proponent of the pleading has a cause of action, not

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[15] There was a dissent at the Appellate Division in *Joan Briton*. Notably, the dissent did not disagree with the majority position respecting privity (*see* 36 AD2d at 467 ["if the defendant has obtained [a benefit] from a third person which should have gone to the plaintiff, it may be recovered on this theory"]), which is consistent with the view articulated in this dissent. Rather, the dissent's disagreement with the majority was related to the wrongfulness of the plaintiff's actions (*id.* at 466-467 ["There is not even a contention, much less a suggestion, that this defendant knew or had reason to suspect that [the co-defendant] would not pay according to his undertaking. Nor is there any suggestion that she would have undertaken or could afford the project absent his agreement to be responsible."]). Here, the complaint alleges that the various parties took actions that they knew would ultimately deprive MaloneCo of the benefit of its hard-earned commission. Such actions are wrongful.

whether he has stated one" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]), to require that plaintiff plead the minutia of the unjust enrichment claim (*see Suffolk County Water Authority v Dow Chem. Co.*, 30 Misc 3d 1202[A], 2010 NY Slip Op 52243[u], *4 [2010] ["While much of what [plaintiff] has stated may need to be demonstrated with specific information . . . such will be done through the discovery process. . . . However, as set forth, the complaint places the movants on notice of the conduct . . . with which it charges them; it gives notice of the manner in which some of the evidence exists; it sets forth the method by which the harm . . . assertedly occurred; and it sets forth its basis for . . . damages. This does not mean such can be proved; however, it is sufficient to satisfy the requirements of CPLR § 3211(a)(7)"]; *see also* CPLR 3211[d]). Plaintiff should be entitled to seek recovery for the unjust enrichment of those who knowingly and wrongfully misappropriated its property as well as those who benefitted from property that they knew came into their hands as a result of the wrongful action of a third party.[16]

[16] Contrary to the majority's assertion, the standard I am proposing would not "result in liability for anyone who simply knew of the plaintiff's existence." My standard would only result in liability when a party was enriched and had awareness

Finally, I believe there are strong prudential reasons for rejecting the majority's attempt to reintroduce a heightened privity requirement (*cf.* Perillo, *Restitution in a Contractual Context*, 73 Colum L Rev 1208, 1211 [1973] [describing privity as an "unintelligible" requirement "in a context where liability may be thrust upon the defendant by a stranger"]). As such, plaintiff's fourth cause of action should be reinstated. If plaintiff prevails, it should be entitled to obtain restitution for the full amount (i.e., $750,000) that it alleges it would have received had the parties not misappropriated its property.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

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that the other party was conferring a benefit upon it that in equity and good conscience it could not retain.

Friedman, J.P., Catterson, Renwick, Abdus-Salaam, JJ.

4254 Barbara Ross, et al., Index 17038/07
Plaintiffs-Respondents,

-against-

Betty G. Reader Revocable Trust,
Defendant-Respondent-Appellant,

Emigrant Business Credit Corporation,
Defendant-Appellant-Respondent,

Uno Restaurant Holdings Corp, etc., et al.,
Defendants.

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Eustace & Marquez, White Plains (John R. Marquez of counsel), for appellant-respondent.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for respondent-appellant.

Leav & Steinberg, LLP, New York (Daniela F. Henriques of counsel), for respondents.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered December 29, 2009, which, insofar as appealed from, denied defendants Betty G. Reader Revocable Trust's and Emigrant Business Credit Corporation's respective motions for summary judgment dismissing the complaint and all cross claims against them, unanimously modified, on the law, to the extent of granting the motion of Betty G. Reader Revocable Trust, and otherwise affirmed, without costs. The Clerk is directed to enter judgment

accordingly.

Plaintiff Barbara Ross injured her wrist at approximately 5:30 P.M. when she slipped and fell in a greasy, black substance on the sidewalk in front of a branch of Emigrant Business Credit Corporation (Emigrant). Emigrant leased the premises from Betty G. Reader Revocable Trust (Reader), the owner of the property. Plaintiff brought this premises liability action against, inter alia, Emigrant and Reader, alleging that defendants failed to maintain the sidewalk in a reasonably safe condition.[1]

At her deposition, plaintiff testified that upon seeing that the bank was closed, she turned towards the curb, took several steps, slipped and fell to the ground. She testified that the sidewalk was "filthy, and slippery, and greasy, and black."

An Emigrant customer service representative, who was employed at that branch on the date of plaintiff's accident, was also deposed. She testified that she had seen garbage and "mush" in the street in front of the bank at around 8 A.M. that morning, and almost slipped and fell herself in the "slimy" food debris as

[1] The remaining defendants, including Pizzeria Uno, the tenant adjacent to Emigrant, were granted summary judgment dismissing the complaint against them by the same decision and order from which the instant appeal is taken. Plaintiff cross-appealed, but Pizzeria Uno subsequently settled with the plaintiff and she withdrew her cross appeal.

she stepped onto the curb. She testified that she had seen the same sort of loose food and garbage on previous occasions on the adjacent sidewalk. She testified that she told another employee about it and also complained to her immediate supervisor.

The Emigrant representative further testified that when she left work that day, approximately an hour and a half before plaintiff's fall, she saw similar food debris in the street. She testified that she did not know whether Emigrant had any duty to maintain the sidewalk, and had never seen an Emigrant employee maintaining, inspecting or cleaning the sidewalk.

A representative of Reader's managing agent testified at deposition that the written lease between Reader and Emigrant states that the tenant is responsible for removal of garbage and for sidewalk maintenance. The lease requires Emigrant to "keep clean and free from dirt [and] . . . rubbish, . . ., and maintain . . . the [adjacent] sidewalks . . ."

Emigrant moved for summary judgment dismissing the complaint and all cross claims against it on the grounds that it did not create or have actual or constructive notice of the dangerous condition that caused plaintiff's injury. Reader moved for summary judgment on the same grounds, and also that it was an out-of-possession owner. By decision and order dated December

21, 2009, the motion court denied both motions, finding that defendants failed to make the requisite prima facie showing.

For the reasons set forth below, we find that the motion court properly denied summary judgment to Emigrant, but erred in denying summary judgment to Reader. An out-of-possession landlord is generally not liable for the condition of the demised premises unless the landlord has a contractual obligation to maintain the premises, or right to re-enter in order to inspect or repair, and the defective condition is "a significant structural or design defect that is contrary to a specific statutory safety provision" (*see Babich v. R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [2010]). The lease between Reader and Emigrant imposes no contractual duty on Reader to clean the sidewalk, and, although Reader retained the right to re-enter, grease on a sidewalk is not a significant structural or design defect. Accordingly, Reader is an out-of-possession landlord entitled to summary judgment as a matter of law.

Emigrant, however, failed to show that there are no triable issues of fact with regard to whether it had constructive notice of the dangerous condition. A defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it neither created, nor had actual or constructive

notice of the dangerous condition that caused plaintiff's injury (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [2008]). In this case, plaintiff does not allege that either Reader or Emigrant created the alleged dangerous condition, and record evidence establishes that neither defendant had actual notice.

Constructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition (*cf. Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell (*see Raghu v New York City Hous. Auth.*, 72 AD3d 480 [2010]; *Vilomar v 490 E. 181st St. Hous. Dev. Fund Corp.*, 50 AD3d 469 [2008]).

Emigrant's failure to produce such evidence mandates that we deny summary judgment (*see e.g. Aviles v 2333 1st Corp.*, 66 AD3d 432 [2009] citing *Moser v BP/CG Ctr. I, LLC*, 56 AD3d 323 [2008]. Emigrant concedes that the customer service representative who testified on its behalf was "not familiar with the Bank's sidewalk maintenance and did not offer any testimony concerning

maintenance of the sidewalk prior to and contemporaneous with the incident . . .” Moreover, rather than supporting Emigrant, her testimony also raises a triable issue of fact as to whether Emigrant had constructive notice that the purported greasy, black substance on the sidewalk that caused plaintiff’s injury was a dangerous unremedied condition (*see e.g. Bido v 876-882 Realty, LLC*, 41 AD3d 311 [2007]; *Modzelewska v City of New York*, 31 AD3d 314 [2006]; *Irizarry v 15 Mosholu Four, LLC*, 24 AD3d 373 [2005]).

We have considered Emigrant’s remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

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Tom, J.P., Sweeny, Catterson, Acosta, Manzanet-Daniels, JJ.

4650 James R. Ford, Index 302542/07
Plaintiff-Respondent,

-against-

Urian Weishaus,
Defendant,

Corrine Weishaus,
Defendant-Appellant.

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Gannon, Lawrence & Rosenfarb, New York (Jason B. Rosenfarb of counsel), for appellant.

Burns & Harris, New York (Andrea V. Borden of counsel), for respondent.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered July 19, 2010, which denied defendant-appellant's motion for summary judgment dismissing the complaint, affirmed, without costs.

Plaintiff alleges that he was injured when he tripped on a cracked floor at premises owned by defendant and leased by plaintiff's employer, presently on a month-to-month basis. In support of her motion to dismiss on the ground that she is an out-of-possession landlord, defendant submitted a 1984 lease imposing maintenance and repair obligations on the tenant. However, she previously gave deposition testimony indicating that

changes may have been made to the original lease.

Defendant failed to establish her prima facie entitlement to judgment as a matter of law, and there exists a triable issue as to whether a subsequent written agreement altered defendant's contractual obligations to repair and maintain the building. Reply affidavits stating that the 1984 lease was the only lease with the tenant and was not renewed were properly rejected as an attempt "to remedy a fundamental deficiency in the moving papers by submitting evidentiary material with the reply" (*Sanford v 27-29 W. 181st St. Assn.*, 300 AD2d 250, 251 [2002]; *see also Migdol v City of New York*, 291 AD2d 201 [2002]).

All concur except Catterson, J. who dissents in a memorandum as follows:

CATTERSON, J. (dissenting)

I must respectfully dissent. In my opinion, the defendant's affidavit in support of the motion for summary judgment is consistent with her prior deposition testimony. Contrary to the motion court's determination, there simply was no triable issue of fact as to whether there is a new lease with new terms that obligated the defendant to maintain the building where the plaintiff was injured. Accordingly, I believe the defendant established that she is an out-of-possession landlord entitled to summary judgment as a matter of law.

The plaintiff injured his knee, hip and back on or about June 21, 2006 when he allegedly tripped and fell over a crack in the floor of a building leased by his employer. On November 7, 2007, the plaintiff brought the instant personal injury action against the defendant owners of the building alleging that the premises were not maintained in a reasonably safe condition.[1]

At deposition, the defendant, then 80 years old, testified that she did not have a copy of the lease in effect in June 2006, or the lease in effect at the time of her deposition. While she recalled that the lease was executed when her husband was alive,

[1] Defendant Urian Weishaus died in 1990 and sole title of the building passed to his widow, defendant Corrine Weishaus.

she was unfamiliar with its terms and testified that she was unaware of any of her rights or responsibilities under the lease.

The defendant further testified that she could not remember when she had last been to the building and had been there only on "rare" occasions to drop off or pick up her son, who is president and part owner of the tenant, plaintiff's employer. She testified that she did not know how many floors there were in the building and did not notice the condition of the floors. The defendant testified that she had never been through the entire building and did not recognize the interior in photographs.

By notice of motion dated October 20, 2009, the defendant moved for summary judgment to dismiss the complaint on the grounds that she is an out-of-possession landlord with no notice of the alleged defective condition that caused plaintiff's injuries. The defendant attached a copy of the lease to her moving papers. The lease is for a term of 10 years beginning June 1, 1984 and is signed by the defendant and her husband.

Under the lease, the tenant is responsible "for all taxes, assessments, repairs, improvements and or other charges or expenses in connection with the maintenance of the building." Furthermore, the defendant may re-enter the premises "if . . . the tenant, fail[s] to pay the [r]ent, or any part of the [r]ent

when it becomes due." There are no terms regarding renewal of the lease.

The plaintiff opposed the motion on the grounds that, inter alia, the defendant stated at deposition that she believed there were some changes to the lease. When asked by the plaintiff's attorney if she and the tenant currently had the same lease with renewals, or if a new lease was drawn up every time it was renewed, the defendant answered, "I believe there were some changes, but I couldn't tell you." The plaintiff argued that defendant's statement raises a triable issue of fact as to whether a more recent lease was executed that contractually obligates the defendant to make repairs to the building.

In reply, the defendant submitted an affidavit asserting that a search of her records indicated that the 1984 lease is the only lease in existence, and that since its expiration, the tenant continued renting month-to-month under the same terms. The defendant's affidavit also explained that her reference to "some changes" referred to oral adjustments to the rent.

The defendant's son also submitted an affidavit stating that the 1984 lease is the only lease in existence and that since its expiration, the tenant has continued renting month-to-month. He confirmed that any changes to the 1984 lease terms were oral

adjustments to the rent.

The motion court denied defendant's motion for summary judgment, finding, inter alia, that defendant's affidavit "somewhat alters" her deposition testimony, and so issues of fact exist as to the leasing of the premises and changes to the lease.

I disagree. The motion court's finding of a triable issue of fact is based on nothing more than defendant's deposition testimony in which defendant essentially stated, in answering a compound question, that there may have been changes to the original lease. In other words, the denial of summary judgment is based on nothing more than speculation that there may have been a new lease, and further speculation that the undiscovered new lease may have included new terms imposing liability on the defendant. Such speculation is not sufficient to raise a triable issue of fact. Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 598, 404 N.E.2d 718, 720 (1980).

It is axiomatic that a definitive factual assertion in a reply affidavit does not contradict earlier testimony expressing doubt concerning that fact. See Molina v. Roosevelt Hotel, 300 A.D.2d 195, 752 N.Y.S.2d 637 (1st Dept. 2002); Bosshart v. Pryce, 276 A.D.2d 314, 714 N.Y.S.2d 40 (1st Dept. 2000). Moreover, where, as here, a reply affidavit is reconcilable with prior

testimony, it should not be disregarded as "self-serving." Kalt v. Ritman, 21 A.D.3d 321, 323, 800 N.Y.S.2d 168, 170 (2005)(internal quotation marks and citation omitted); see e.g. Peri v. City of New York, 44 A.D.3d 526, 843 N.Y.S.2d 618 (2007), aff'd 11 N.Y.3d 756, 864 N.Y.S.2d 802, 894 N.E.2d 1192 (2008); Faulkner v. Allied Manor Rd. Co., 306 A.D.2d 224, 225, 760 N.Y.S.2d 853, 854 (2003).

In this case, the beginning of defendant's one-sentence answer, "I believe there were some changes," was negated by the phrase, "but I couldn't tell you," indicating that she had no knowledge of the lease or any subsequent renewals. Thus, the defendant's reply affidavit, rather than altering her testimony and raising a triable issue of fact, responds to a question previously unanswered in her deposition and clarifies her ambiguous reference to "changes" to the lease.

In crediting defendant's affidavit, I would also find that the terms of the 1984 lease were in effect at the time of the plaintiff's accident. See Real Property Law § 232-c; City of New York v. Pennsylvania R.R. Co., 37 N.Y.2d 298, 300, 372 N.Y.S.2d 56, 58, 333 N.E.2d 361, 362 (1975)(upon a landlord's acceptance of rent from a tenant who is holding over, there is an implied continuance of the tenancy on the same terms as those contained

in the original lease).

Here, the 1984 lease terms assign repair and maintenance obligations to the tenant and the defendant may only re-enter in the event of the tenant's default on rental payments. Therefore, the defendant is an out-of-possession landlord entitled to summary judgment as a matter of law. See Johnson v. Urena Serv. Ctr., 227 A.D.2d 325, 326, 642 N.Y.S.2d 897, 898 (1st Dept. 1996), lv. denied 88 N.Y.2d 814, 651 N.Y.S.2d 16, 673 N.E.2d 1243 (1996) (landlord generally not liable unless, under the lease, he is obligated to repair and maintain the premises or retained a right to re-enter to inspect and repair).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

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Saxe, J.P., Friedman, Freedman, Richter, JJ.

4942-
4943 Index 303554/07

National Union Fire Insurance
Company of Pittsburgh, PA, et al.,
Plaintiffs,

-against-

Great American E&S Insurance Company,
Defendant-Appellant,

Solar Electric Systems, Inc.,
Defendant-Respondent,

Lisa Best,
Defendant.

_____

Rivkin Radler LLP, Uniondale (Michael A. Kotula of counsel), for appellant.

Welby, Brady & Greenblatt, LLP, White Plains (Gregory J. Spaun of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered March 5, 2010, which, insofar as appealed from, denied so much of defendant Great American E&S Insurance Company's (Great American) motion for summary judgment dismissing the cross claim asserted against it by defendant Solar Electric Systems, Inc. (Solar) and declaring that it has no duty to defend or indemnify Solar in the underlying personal injury action, unanimously reversed, on the law, without costs, to grant Great American's motion to the extent of declaring that it has no duty

to defend or indemnify Solar in the underlying action. Appeal from order, same court and Justice, entered on or about October 7, 2010, which denied Great American's motion for reargument, unanimously dismissed, without costs, as taken from a nonappealable order.

In November 2005, Solar, an electrical subcontractor, contracted with nonparty West-Fair Electric Contractors to provide the electrical work for a construction project undertaken by plaintiff Ethical Culture Fieldston School (ECF). Under the contract with West-Fair, Solar agreed to defend, indemnify and hold harmless ECF and the project manager, Tishman, as well as to procure insurance for both entities. Solar subsequently obtained a general liability policy through Great American and named Tishman and ECF as additional insureds on its Certificate of Insurance. The notice provision of the policy required all insureds to notify Great American of an occurrence and any ensuing claim or suit "as soon as practicable," and to immediately provide Great American with any legal papers in connection with a claim or suit.

On July 20, 2006, Lisa Best, a Solar employee, was injured at the project site. Best tripped over an extension cord, fell and injured her knee when she and her supervisor were completing

a preliminary review of the project site in an area where Solar had not yet started work. She was taken by ambulance to the hospital and was advised to remain out of work for over a month as a result of her knee injury. On the day of the accident, Solar completed an "Employer's Report" and "Supervisor's 24-Hour Incident Report" detailing the accident and medical attention received by Best. Solar also faxed both reports to its workers' compensation carrier, individual insurance broker and Tishman. Notably, the insurance broker is not an agent of or associated with Great American. Additionally, Solar filed the appropriate form with the New York State Workers' Compensation Board, and Best started receiving workers' compensation benefits on July 21, 2006.

In June 2007, Best commenced a personal injury lawsuit naming Tishman and ECF as defendants (the "underlying action"). In August 2007, Tishman and ECF served a third-party complaint on Solar, impleading it as a third-party defendant to Best's lawsuit. Tishman forwarded Best's lawsuit to Great American in June 2007, and Solar forwarded the third-party complaint to Great American in August 2007, along with a request for coverage per the general liability policy. ECF did not provide notice to Great American of the occurrence or underlying action until

December 2007. Great American refused to provide insurance coverage to all three entities.

Tishman and ECF commenced this action seeking a declaratory judgment that Solar's insurer, Great American, was obligated to defend and indemnify them in the underlying action. Solar cross claimed against Great American for a declaration that Great American is obligated to defendant and indemnify it in the underlying action. Great American subsequently moved for summary judgment dismissing the complaint and Solar's cross claim against it, and declaring that it has no duty to defend or indemnify Solar in the underlying action.

The motion court should have granted Great American's motion as to Solar to the extent of declaring that Great American is not required to provide coverage in the underlying action. The notice provision in the general liability policy operates as a condition precedent to coverage, and absent a valid excuse, failure to comply with the requirement vitiates the contract (*Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743 [2005]). Solar failed to provide timely notice of the occurrence because it did not notify Great American until August 2007, over one year after the accident. Indeed, this Court has found shorter delays to be untimely (*Brownstone Partners/AF&F,*

LLC v A. Aleem Constr., Inc., 18 AD3d 204, 205 [2005] [five month delay]; *Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235 [2002] [seven month delay]).

Although a reasonable good-faith belief of nonliability may, in certain circumstances, excuse a failure to give timely notice (*Great Canal*, 5 NY3d at 743), such circumstances do not exist here. Solar contends that because it believed Best's exclusive remedy was under the Workers' Compensation Law, it could not be held liable for her injuries. However, this claimed belief was not reasonable under the circumstances (*see Macro Enters., Ltd. v QBE Ins. Corp.*, 43 AD3d 728 [2007] [holding that the plaintiff's belief that the injured employee's exclusive remedy was under the Workers' Compensation Law was not reasonable]). Moreover, Solar never sought clarification of the coverage at issue, either from its counsel or insurance carrier. Thus, *Tesler v Paramount Ins. Co.* (220 AD2d 334 [1995]), cited by the motion court and Solar, is distinguishable because, in that case, the insurance agent specifically advised the insured that there was no indication a claim could be brought against it. Here, there was no evidence that Solar was advised by any insurance agent as to nonliability.

Additionally, Solar's contract with West-Fair required it to defend, indemnify and hold harmless Tishman and ECF. Best was

injured on property owned by ECF and managed by Tishman. It was not reasonable for Solar to believe that Best would not seek further recovery from the site owner and project manager, both of which Solar had agreed to defend and indemnify. In the face of this indemnification requirement, coupled with the fact that Best was taken by ambulance to the hospital and remained out of work for over a month, Solar is unable to show a reasonable belief in nonliability.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Tom, J.P., Saxe, Acosta, Freedman, JJ.

5195 In re Karen Bitchatchi, Index 115266/09
Petitioner-Respondent

-against-

Board of Trustees of the New York City Police Department Pension Fund, Article II,
Respondent-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Keith M. Snow of counsel), for appellant.

Rosemary Carroll, Clermont, for respondent.

Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered April 16, 2010, which granted the petition brought pursuant to CPLR article 78 seeking, inter alia, to annul the determination of respondent denying petitioner accident disability retirement (ADR) benefits and found that petitioner was entitled to the greater benefit as a matter of law and remanded the matter to respondent to grant the petitioner the ADR pension and to recompute petitioner's retirement allowance, unanimously affirmed, without costs.

Supreme Court properly determined that respondent failed to rebut with credible evidence the presumption of Administrative Code of the City of New York § 13-252.1, that petitioner's cancer

was caused by her service at the World Trade Center site in the days immediately following September 11, 2001 (*see generally Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 147 [1997]; *compare Matter of Jefferson v Kelly*, 51 AD3d 536 [2008]). There is no credible evidence to support the Medical Board's assertion that the size of tumor meant it began growing before September 11, 2001, and thus could not have been the result of or exacerbated by exposure. Nor is there credible evidence to support the Medical Board's conclusion that petitioner's cancer was caused by her episode of ulcerative colitis and the corrective surgery, which occurred nearly 20 years prior to the onset of the cancer.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Andrias, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

5502 Walter C. Bedder, Index 109187/07
Plaintiff-Appellant,

-against-

Windham Mountain Partners, LLC, et al.,
Defendants-Respondents.

_____

Lurie, Ilchert, MacDonnell & Ryan LLP, New York (Dennis A. Breen of counsel), for appellant.

Carol A. Schrager, New York, for respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered November 1, 2010, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff seeks damages for injuries he suffered during a snowboarding run down defendants' mountain trail. By engaging in the recreational sport of snowboarding, plaintiff "consent[ed] to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Whitman v Zeidman*, 16 AD3d 197, 197 [2005] [internal quotation marks and citation omitted]). Personal injury caused by hitting a stump on the side of the trail, while swerving to avoid another person using the trail, is one of the

risks inherent in downhill snowboarding (General Obligations Law § 18-101; *Farone v Hunter Mtn Ski Bowl, Inc.*, 51 AD3d 601 [2008], *lv denied* 11 NY3d 715 [2009]; *see also Painter v Peek'N Peak Recreation*, 2 AD3d 1289 [2003]). Plaintiff's expert affidavit was conclusory and therefore insufficient to raise an issue of fact whether defendants' alleged negligent construction and maintenance of the trail created additional risks not inherent in downhill snowboarding (*see Owen v R.J.S. Safety Equip.*, 79 NY2d 967, 970 [1992]).

We have considered plaintiff's remaining argument and find it unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Andrias, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

5503 In re Chris Mullusky, Index 113984/09
Petitioner,

-against-

New York City Department of Parks
and Recreation, et al.,
Respondents.

_____

Richard V. Rappaport and Associates, East Meadow (Richard V. Rappaport of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Alan G. Krams of counsel), for respondents.

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Determination of respondent Department of Parks and Recreation, dated June 5, 2009, which terminated petitioner's employment, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Emily Jane Goodman, J.], entered January 13, 2010), dismissed, without costs.

The determination that petitioner violated agency rules by uttering anti-Semitic remarks and engaging in anti-Semitic conduct, for the purpose of harassing a Jewish co-worker, is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180

[1978]). We perceive no basis to disturb the Administrative Law Judge's credibility determinations (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

The penalty of termination does not shock our sense of fairness in light of petitioner's conduct and his prior disciplinary history (*see Matter of Kelly v Safir*, 96 NY2d 32, 39-40 [2001]).

We have considered petitioner's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Andrias, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

5504 The People of the State of New York, Ind. 3149N/08
Respondent,

-against-

Junior Lantigua,
Defendant-Appellant.

- - - - -

5505 The People of the State of New York, Ind. 2972/08
Respondent,

-against-

Miguel Mejias,
Defendant-Appellant.

- - - - -

5506 The People of the State of New York, Ind. 2972/08
Respondent,

-against-

Antonio Rodriguez,
Defendant-Appellant.

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Goldberger & Dubin, P.C., New York (Stacey Van Malden of counsel), for Junior Lantigua, appellant.

John R. Lewis, Sleepy Hollow, for Miguel Mejias, appellant.

Edward M. Kratt, P.C., New York (Edward M. Kratt of counsel), for Antonio Rodriguez, appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Timothy C. Stone of counsel), for respondent.

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered October 27, 2009, convicting defendant Junior

Lantigua of conspiracy in the second degree, and sentencing him to a term of 2 to 6 years, unanimously affirmed. Judgment, same court and Justice, rendered September 24, 2009, convicting defendant Miguel Mejias of criminal possession of a controlled substance in the first degree and conspiracy in the second degree, and sentencing him to concurrent terms of 13 years and 5 to 15 years, unanimously affirmed. Judgment, same court and Justice, rendered February 9, 2010, convicting defendant Antonio Rodriguez of criminal possession of a controlled substance in the first degree and conspiracy in the second degree, and sentencing him to concurrent terms of 12 years and 5 to 15 years, unanimously affirmed.

The court's rulings relating to expert testimony were proper exercises of discretion. The People's translator was fully qualified to translate the Spanish conversations intercepted on wiretaps. The court properly permitted an expert to give background testimony on large-scale narcotics operations and to explain coded language. This information is beyond the knowledge of the average juror and would assist the jurors in understanding the evidence in a case involving complex, international drug activity (*see People v Brown*, 97 NY2d 500, 505-506 [2002]; *People v Ramirez*, 33 AD3d 460 [2006], *lv denied* 7 NY3d 928 [2006];

People v Contreras, 28 AD3d 393 [2006], *lv denied* 7 NY3d 847 [2006]). Given the type of case, use of a map of the Western Hemisphere to illustrate the international flow of drugs was also permissible and was not unduly prejudicial.

At the close of evidence and prior to summations, the court received a jury note requesting information and containing language that allegedly suggested the possibility of premature deliberations. The court did not abuse its discretion when it declined to conduct any individual inquiries, but instead addressed the problem by way of inquiries directed to the jury as a group, along with careful instructions (*see People v Buford*, 69 NY2d 290, 298-299 [1987]). Given the circumstances, there is no reason to believe there were actually any premature deliberations, and the court's actions were sufficient to avoid any prejudice.

The court properly precluded defendant Rodriguez from using a surveillance report to impeach an investigator. The investigator did not prepare the report, no statements in it were attributable to him, and Rodriguez did not lay any other foundation for use of the report (*see People v Johnson*, 227 AD2d 101, 102 [1996], *lv denied* 88 NY2d 987 [1996]). Rodriguez did not preserve his claim that the court's ruling violated his right

of confrontation and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

The court's charge sufficiently conveyed the principle that the jury was required to consider each charge separately (*see generally People v Fields*, 87 NY2d 821, 823 [1995]).

Defendants did not preserve any of their remaining challenges to the court's instructions, or any challenges to the sufficiency of the evidence or the court's dismissal of a juror, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

We perceive no basis for reducing Rodriguez's sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Andrias, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

5507 In re Countrywide Insurance Company, Index 106563/10
Petitioner-Appellant,

-against-

DHD Medical, P.C.,
Respondent-Respondent.

_____

Thomas Torto, New York, for appellant.

Ruskin Moscou Faltischek, P.C., Uniondale (Matthew F. Didora of counsel), for respondent.

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Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered November 30, 2010, which denied the petition to stay arbitration of claims for no-fault insurance benefits and granted respondent's cross motion to dismiss the proceeding, unanimously affirmed, with costs.

Petitioner argues that respondent is a fraudulently incorporated medical services provider and therefore is not only ineligible for reimbursement of no-fault payments (*see State Farm Mut. Auto. Ins. Co. v Mallela*, 4 NY3d 313 [2005]) but is also precluded from demanding arbitration pursuant to Insurance Law § 5106(b) (and the no-fault policy issued by petitioner). Contrary to this argument, the defense of fraudulent incorporation is "for the arbitrator and not for the courts" (*see*

Matter of Nassau Ins. Co. v McMorris, 41 NY2d 701 [1977]; *Matter of MVAIC v Interboro Med. Care & Diagnostic PC*, 73 AD3d 667, 667 [2010]). Indeed, it has been the subject of numerous arbitration proceedings (*see e.g. State Farm Mut. Auto. Ins. Co. v Kissena Med. Imaging, P.C.*, 25 Misc 3d 1214A [2009 NY Slip Op 52094(U)] [2009]; *Uptodate Med. Serv., P.C. v State Farm Mut. Auto. Ins. Co.*, 22 Misc 3d 128A [2009 NY Slip Op 50046(U), *2] [2009]).

We have considered plaintiff's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Andrias, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

5510 Whitebox Concentrated Convertible Arbitrage Partners, L.P., et al., Plaintiffs-Respondents, Index 651465/10

-against-

Superior Well Services, Inc., Defendant-Appellant.

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Simpson Thacher & Bartlett LLP, New York (Bruce D. Angiolillo of counsel), for appellant.

Ross & Orenstein LLC, Minneapolis, MN (John B. Orenstein of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered March 3, 2011, which denied defendant's motion to dismiss the complaint, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Defendant established by documentary evidence that the acquisition of more than 50% of its stock and the subsequent merger with Diamond Acquisition Corporation did not constitute a "Fundamental Change" as defined in the certificate of designations, which would have required defendant to provide a Fundamental Change Notice to its preferred shareholders within 10 days of a Fundamental Change. The tender offer for common shares

and defendant's subsequent merger into Diamond, with defendant being the surviving entity, were two consecutive steps in a single, integrated transaction (*see Noddings Inv. Group, Inc. v Capstar Communications*, 1999 WL 182568, 1999 Del Ch LEXIS 56 [Del Ch 1999], *affd* 741 A2d 16 [Del 1999]).

The plain language of the certificate of designations for the convertible preferred stock unambiguously demonstrated that defendant, a Delaware corporation, did not effect a Fundamental Change (*see Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]). The fact that plaintiffs attached a particular, subjective meaning to the term "transaction" that differed from the term's plain meaning did not render the term ambiguous (*see Slattery Skanska Inc. v American Home Assur. Co.*, 67 AD3d 1, 15 [2009]; *Innophos, Inc. v Rhodia, S.A.*, 38 AD3d 368, 369 [2007], *affd* 10 NY3d 25 [2008]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Andrias, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

5511-
5512 Rosario Sebastiano, et al.,
Plaintiffs-Respondents-Appellants,

-against-

New York City Transit Authority,
Defendant-Appellant-Respondent.

Index 20936/05

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for appellant-respondent.

The Breakstone Law Firm, P.C., Bellmore (Jay L.T. Breakstone of counsel), for respondents-appellants.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered January 13, 2010, which granted defendant's posttrial motion to set aside the jury verdict in favor of plaintiffs on the statutory claim and directed a new trial, unanimously modified, on the law, judgment granted in favor of defendant as to the statutory claim, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiffs seek to recover for personal injuries plaintiff Rosario Sebastiano allegedly sustained when she tripped on a stairway in a subway station while working as a New York City police officer. After trial, the jury returned a verdict in plaintiffs' favor on their General Municipal Law § 205-e claim.

In particular, the jury found that defendant failed to comply with Administrative Code of the City of New York §§ 27-127, 27-128 and 27-375, Building Code of New York State § 1003.3.6, and Property and Maintenance Code of New York State § 304.4, and that each noncompliance was a "direct or indirect cause" of plaintiff's injuries. The jury also found that while defendant was negligent, such common-law negligence was not a "substantial factor" in causing plaintiff's injuries.

To establish a claim pursuant to General Municipal Law § 205-e, plaintiffs were required to prove a violation of a statute or ordinance (*see Williams v City of New York*, 2 NY3d 352, 363 [2004]). Because the subject station was built in 1915, prior to the enactment of the Code provisions relied upon by plaintiffs, it was incumbent on plaintiffs to establish that the station was renovated or altered prior to the accident and "that the nature and extent of the alterations subjected the building to the Code provisions cited" (*Anderson v Creston Assoc., LLC*, 59 AD3d 298, 299 [2009]).

Here, although the record establishes that the subject station was undergoing extensive renovation at the time of the accident, plaintiffs have not demonstrated that the nature and

extent of the renovations subjected the station to the cited Code provisions (*see Anderson*, 59 AD2d at 299). We reject plaintiffs' assertion that the renovations required that the structure comply with the 1968 Building Code of the City of New York. New York City Administrative Code § 27-115 requires that an existing building comply with the requirements of the Code "[i]f the cost of making alterations in any twelve-month period shall exceed sixty percent of the value of the building." Here, the renovations were not yet complete at the time of the accident and there is no evidence of the cost of the renovation or the value of the structure. Accordingly, Supreme Court should have directed entry of judgment in defendant's favor on plaintiffs' statutory claim.

We decline to review plaintiffs' claim that the jury's verdict was inconsistent, since they failed to raise it before the jury was discharged or on the posttrial motion (*see Barry v Manglass*, 55 NY2d 803, 805 [1981]; *Martinez v New York City Tr. Auth.*, 41 AD3d 174, 175 [2007]; *Recovery Consultants v Shih-Hsieh*, 141 AD2d 272, 276 [1988]). In any event, the argument is unavailing, since the standard of proof required to

establish causation on the statutory claim is lower than that required on the common-law negligence claim (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *Cerati v Berrios*, 61 AD3d 915 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Andrias, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

5513 The People of the State of New York, Ind. 3686/08
Respondent,

-against-

Alberto Deluna,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (John Vang of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert Stolz, J.), rendered on or about February 23, 2010,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: JULY 7, 2011

CLERK

Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.

Andrias, J.P., Sweeny, Renwick, Freedman, Manzanet-Daniels, JJ.

5514 In re 219 East 69th Street Tenants Association, et al., Petitioners-Appellants,

-against-

New York State Division of Housing and Community Renewal, Respondent-Respondent,

219 East 69th Street, LLC, Intervenor-Respondent.

Index 112077/09

Collins Dobkin & Miller LLP, New York (Timothy L. Collins of counsel), for appellants.

Gary R. Connor, New York (Kathleen Lamar of counsel), for NYSDHCR, respondent.

Order and judgment (one paper), Supreme Court, New York County (Carol Edmead, J.), entered February 3, 2010, which, insofar as appealed from as limited by the briefs, denied the petition to annul the determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated June 25, 2009, granting intervenor-respondent owner's application for a major capital improvement (MCI) rent increase based on the installation of new windows, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Contrary to petitioner's contention, the record before DHCR

permitted it to rationally and reasonably find that, other than seven apartments where defective window installations were found, the remaining apartments were subject to a MCI rent increase based on the window installations (*compare Matter of Ansonia Residents Assn. v New York State Div. of Hous. & Community Renewal*, 75 NY2d 206 [1989], *with Matter of Weinreb Mgt. v New York State Div. of Hous. & Community Renewal*, 305 AD2d 207 [2003]). DHCR providently exercised its discretion in attempting to inspect only those apartments identified by petitioners as having defective window installations (*see Matter of 370 Manhattan Ave. Co., L.L.C. v New York State Div. of Hous. & Community Renewal*, 11 AD3d 370, 371 [2004]). Contrary to petitioner's contention, there was no court order requiring DHCR to perform more inspections.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Abdus-Salaam, Román, JJ.

5516 Juan J. Baez-Ferreira, Index 310270/09
Plaintiff-Respondent,

-against-

Luis A. Marte,
Defendant-Appellant,

Suzette M. Mennen, et al.,
Defendants.

_____

Skenderis & Cornacchia P.C., Long Island City (Louis T. Cornacchia of counsel), for appellant.

Law Office of Ryan S. Goldstein, PLLC, Bronx (Ryan S. Goldstein of counsel), for respondent.

_____

Appeal from order, Supreme Court, Bronx County (Wilma Guzman, J.), entered December 9, 2010, which, insofar as appealed from as limited by the briefs, in an action for personal injuries sustained in a motor vehicle accident, granted plaintiff's motion for partial summary judgment on the issue of liability as against defendant Marte on default, unanimously dismissed, without costs, as taken from a nonappealable order.

The appeal is dismissed because no appeal lies from an order granted on default (*see Figiel v Met Food*, 48 AD3d 330 [2008]; CPLR 5511). Defendant's remedy was an application to the motion

court to vacate the order (*see Figiel* at 330; CPLR 5015[a][1]).

However, were we to reach the merits we would affirm.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Abdus-Salaam, Román, JJ.

5519 The People of the State of New York, Ind. 3596/01
Respondent,

-against-

Hakim Ray,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Nicholas A. Duston of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Marc A. Sherman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John W. Carter, J.), entered on or about December 4, 2009, which adjudicated defendant a level three sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant was convicted of first-degree rape. In that case, the record discloses that the victim awoke and attempted to fend defendant off before he initiated sexual contact. Therefore, the victim was not "physically helpless" at the time of the rape (*see People v Cecunjamin*, 16 NY3d 488 [2011]), and defendant should not have been assessed 20 points under that risk factor. However, we reject defendant's remaining challenge to his point score. Accordingly, defendant's correct score was 100, which is

slightly below the threshold for a level three offender.

Regardless of whether defendant's correct point score would make him a presumptive risk level two or three offender, the court properly found clear and convincing evidence of aggravating factors to support its discretionary upward departure to level three. The risk assessment instrument did not adequately account for the extreme brutality and aggravated circumstances of the crime (*see e.g. People v Miller*, 48 AD3d 774 [2008], *lv denied* 10 NY3d 711 [2008]; *People v Sanford*, 47 AD3d 454 [2008], *lv denied* 10 NY3d 707 [2008]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Abdus-Salaam, Román, JJ.

5520 China Development Industrial Bank, Index 650957/10
Plaintiff-Respondent,

-against-

Morgan Stanley & Co. Incorporated, et al.,
Defendants-Appellants,

TCW Asset Management Company, et al.,
Defendants.

_____

Davis Polk & Wardwell LLP, New York (James P. Rouhandeh of counsel), for appellants.

Robbins Geller Rudman & Dowd LLP, Melville (Jason C. Davis of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered February 28, 2011, which, to the extent appealed from, denied the Morgan Stanley defendants' (collectively, Morgan) motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) and 3016(b), and denied that branch of the motion seeking to strike plaintiff's demand for a jury trial in connection with plaintiff's fraudulent inducement cause of action, unanimously affirmed, with costs.

In this action alleging common law fraud, fraud in the inducement and fraudulent concealment in the sale of an investment product (credit default swaps), plaintiff purchaser

(China) alleges that defendant seller Morgan falsely promoted collateral debt obligations as having specified credit ratings, which Morgan knew to be overstated and misleading. Specifically, the ratings were allegedly generated with grandfathered models and protocols and assumptions that were no longer applicable. Such ratings for Morgan's products were allegedly procured by way of Morgan's financial influence over the rating agencies. We recognize that a sophisticated business entity, like China, that alleges it was fraudulently induced to enter a contract because of false representations as to a product's quality, may nonetheless be precluded by contractual disclaimers from pursuing such a claim (*see MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419 [2011]). Nevertheless, such rule is not determinative in this case. China has sufficiently alleged that Morgan possessed peculiar knowledge of the facts underlying the fraud, and the circumstances present would preclude any investigation by China conducted with due diligence *(see generally Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274 [2005]). The element of scienter can be reasonably inferred from the facts alleged (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492-493 [2008]), including e-mails, which support a motive by Morgan, at the time of the subject transaction, to

quickly dispose of troubled collateral (i.e., predominantly residential mortgage-backed securities) which it owned at the time.

China also adequately alleged facts in support of its fraudulent concealment claim to indicate that Morgan had a duty to disclose, inasmuch as Morgan allegedly had peculiar knowledge of the application of grandfathered ratings, the unstable collateral which was sold, and its misstatements regarding the investment risks involved (*see generally King County, Washington, Iowa Student Loan Liquidity Corp. v IKB Deutsche Industribank AG*, 751 F Supp 2d 652 [SD NY 2010]).

China's allegations were sufficiently particularized to support a claim for fraudulent inducement. As the validity of the parties' 2007 investment transaction is challenged by the allegations, the motion court properly concluded that the jury waiver provision in the agreement was inapplicable to the fraudulent inducement cause of action (*see generally Wells Fargo Bank, N.A. v Stargate Films, Inc.*, 18 AD3d 264 [2005]).

Morgan argues that China ratified the parties' 2007 transaction agreement when, in May 2009, it executed an amendment to the 2007 agreement. Morgan claims that at such time, China should have been on inquiry notice of the alleged fraudulent

conduct. However, because China claimed it signed the amendment under economic duress, and damage attributable to the fraud may already have accrued (*see e.g. Braddock v Braddock*, 60 AD3d 84, 94-95 [2009]), there are issues of fact which preclude judgment for Morgan.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Abdus-Salaam, Román, JJ.

5521 In re Robert R. Greenberg, Index 106198/10
Petitioner,

-against-

James Wrynn, as Superintendent
of Insurance, etc.,
Respondent.

_____

Gabay-Rafiy & Bowler LLP, New York (Anne Marie Bowler of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Ann P. Zybert of counsel), for respondent.

_____

Determination of respondent, dated October 16, 2009, which denied petitioner's applications for a public adjuster's license pursuant to Insurance Law § 2108 and for written consent to engage in the business of insurance pursuant to 18 USC § 1033, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Michael D. Stallman, J.], entered October 26, 2010) dismissed, without costs.

The denial of petitioner's applications is supported by substantial evidence. The certificate of good conduct he received from the Division of Parole does not establish prima facie his entitlement to a license, but merely creates a

presumption of rehabilitation. Moreover, the certificate is only one of eight factors to be considered pursuant to Correction Law § 753, and we find that respondent considered and properly balanced all the factors (*see Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 365 [1999]; *Matter of Bonacorsa v Van Lindt*, 71 NY2d 605 [1988]).

In petitioner's favor are the public policy of this state to encourage the licensure of persons convicted of criminal offenses (Correction Law § 753[1][a]), the 16-year lapse of time since the occurrence of his criminal offenses (subd [d]), and evidence of his rehabilitation and recent good conduct (subd [g]). Weighing against these factors, however, are petitioner's mature age at the time of the offenses (subd [e]), the seriousness of the offenses (subd [f]), the fact that the public adjuster's license petitioner now seeks is the very same license that aided him in his offenses (subd [b], [c]), and respondent's legitimate interest in protecting the general public (subd [h]).

There is no basis for disturbing the determination of the hearing officer that petitioner was "[not] sufficiently or convincingly contrite about his extensive wrongdoing" (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). Nor, contrary to petitioner's contention, do we find that respondent violated

its procedural rules.

We have reviewed petitioner's remaining contentions and find them without merit.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Abdus-Salaam, Román, JJ.

5523-
5524 The People of the State of New York, Ind. 6541/06
Respondent,

-against-

Roger Reid,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Ellen Dille of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Bonnie Wittner, J.), entered on or about June 8, 2009, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly applied the presumptive override for a prior felony sex crime conviction, and properly exercised its discretion in declining to grant a downward departure. The underlying crime was defendant's sixth sex offense since 1994. Defendant had already been adjudicated a level three sex offender on one of his other cases. In affirming that adjudication order, this Court noted that defendant's "extensive record of similar

acts of sexual abuse demonstrated a high risk of recidivism" (*People v Reid,* 49 AD3d 338, 339 [2008], *lv denied* 10 NY3d 713 [2008]).

Given defendant's apparently uncontrollable recidivism, his "argument that the type of misconduct in which he habitually engages is not serious enough to warrant a level three designation is unpersuasive" (*People v Corian*, 77 AD3d 590, 590 [2010], *lv denied* 16 NY3d 705 [2011]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Abdus-Salaam, Román, JJ.

5525-
5526-
5527 In re Phajja Jada S.,

A Dependent Child Under the
Age of Eighteen Years, etc.,

Toenor Ann S., etc., et al.,
Respondents-Appellants,

Episcopal Social Services,
Petitioner-Respondent.

_____

Lisa H. Blitman, New York, for Toenor Ann S., appellant.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for Curtis W., appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), attorney for the child.

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Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about October 7, 2009, which, upon fact-finding determinations that respondent mother suffers mental illness and that respondent father's consent to adoption was not required, terminated respondents' parental rights and committed the custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Family Court's determination that the mother is mentally ill within the meaning of Social Services Law § 384-b(4)(c) and (6)(a) and is presently and for the foreseeable future unable to care properly and adequately for the child is supported by clear and convincing evidence that the mother has repeatedly been diagnosed with schizoaffective disorder (*see Matter of Sebastian M.*, 64 AD3d 401 [2009]; *Matter of Isaiah J. [Janice J.]*, 82 AD3d 651, 652 [2011]; *Matter of Alyssa Genevieve C. [Laura Marie McG.]*, 79 AD3d 507 [2010]). Even if there were a doubt as to that particular diagnosis, as the mother contends there is, the agency met its burden of demonstrating the mother's mental illness in its "totality" (*see Matter of Melissa R.*, 209 AD2d 155 [1994], *lv denied* 85 NY2d 803 [1995]).

The father failed to meet his burden of demonstrating that he "grasp[ed] the opportunity" to form a relationship with the child by manifesting a willingness to assume parental responsibilities pursuant to Domestic Relations Law § 111(1)(d) (*see Matter of Robert O. v Russell K.*, 80 NY2d 254, 262 [1992]). He failed to show that he provided the child with consistent financial support or that he visited the child at least monthly or communicated with her (*see Matter of Andrew Peter H. T.*, 64 NY2d 1090, 1091 [1985]; *Matter of Margaret Jeanette P.*, 30 AD3d

359 [2006]; *Matter of Sierra*, 289 AD2d 1076 [2001]).

The court's determination that the child's best interests would be served by freeing her for adoption is supported by a preponderance of the evidence (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The child has resided since 2006 in a clean and well kept home with foster parents who are attentive to her special needs and are eager to adopt her.

We have considered respondents' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Abdus-Salaam, Román, JJ.

5529 Victoria Wong, Index 307050/08
Plaintiff-Respondent,

-against-

Ricky Wong,
Defendant-Appellant.

_____

Leitner & Getz LLP, New York (Jerome M. Leitner of counsel), for appellant.

Dobrish Zeif Gross LLP, New York (Steven A. Leshnower of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered November 16, 2010, which, after trial, dismissed defendant's affirmative defense on the grounds that he failed to prove the existence of a binding and valid prenuptial agreement between the parties, unanimously affirmed, without costs.

Defendant failed to meet his burden of establishing that the fully executed prenuptial agreement at issue was ever delivered to him, thus such agreement was neither valid nor binding (Domestic Relations Law § 236[B][3]; *Ross v Ross*, 233 AD 626, 637 [1931], *affd* 262 NY 381 [1933]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506 [1979]; *Alsaedi v Ninth Ave. Realty*, 2 AD3d 233 [2003]).

Moreover, defendant failed to meet his burden to prove the

terms of any valid prenuptial agreement between the parties because no document purporting to be a true and accurate copy of the prenuptial agreement's terms was entered into evidence (*see Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 645 [1994]).

We have considered defendant's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Abdus-Salaam, Román, JJ.

5530- Index 601049/08
5531- 50639/09
5532 Resmac 2 LLC,
Plaintiff-Appellant,

-against-

Madison Realty Capital, L.P., et al.,
Defendants,

Stewart Title Insurance Company,
Defendant-Respondent.

[And a Third-Party Action]

_____

Wachtel & Masyr, LLP, New York (Howard Kleinhendler of counsel), for appellant.

Sanders, Gutman & Brodie, P.C., Brooklyn (D. Michael Roberts of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Charles E. Ramos, J.), entered November 1, 2010, granting defendant Stewart Title Insurance Company's motion for summary judgment and dismissing the complaint as against it, and bringing up for review an order, same court and Justice, entered on or about October 29, 2010, which denied plaintiff's motion for summary judgment on its claims for defense costs and indemnification as against defendant, unanimously modified, on the law, the order and judgment vacated, defendant's motion

denied and plaintiff's motion granted to the extent of declaring that defendant is obligated to reimburse plaintiff for defense costs, and otherwise affirmed, without costs. Appeal from October 29, 2010, order unanimously dismissed, without costs, as subsumed in the appeal from the November 1, 2010 order and judgment.

Plaintiff's failure to notify defendant of the adversary proceeding commenced in the bankruptcy court is not excused by the fact that defendant received notice of the pending litigation from another source (*see Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 43 [2002]). However, defendant did not establish that it was prejudiced by plaintiff's failure, and thus, pursuant to the terms of the policy, plaintiff's failure "shall" not prejudice plaintiff's rights under the policy. Defendant received notice from plaintiff of its potential liability under the policy, as well as a copy of the complaint in the bankruptcy proceeding. Yet, instead of exercising its right under the policy to take action to prevent or reduce loss or damage to its insured, defendant "chose to stay on the sidelines and to allow [plaintiff] to defend the suit on its own" (*see Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 74 AD3d 32, 42 [2010]; *American Tr. Ins. Co. v Hashim*, 68 AD3d 618 [2009], *lv denied* 14

NY3d 708 [2010]). Thus, defendant must reimburse plaintiff for the latter's defense costs.

Defendant is not, however, obligated to indemnify plaintiff for the difference between the face amount of the policy and the amount for which it compromised the value of the subject mortgage at the bankruptcy proceeding, because plaintiff sustained no loss or damage under the policy by taking title to the property (*see Grunberger v Iseson*, 75 AD2d 329 [1980]; *Citibank v Chicago Tit. Ins. Co.*, 214 AD2d 212, 222 [1995], *lv dismissed* 87 NY2d 896 [1995]). Further, plaintiff voluntarily agreed to the settlement amount in the bankruptcy proceeding without notifying defendant, although it was not absolved from complying with its obligations under the policy by defendant's disclaimer of coverage (*see Seward Park Hous. Corp. v Greater N.Y. Mut. Ins. Co.*, 43 AD3d 23, 30-31 [2007]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Abdus-Salaam, Román, JJ.

5533 The People of the State of New York, SCI 4946/02
Respondent,

-against-

Robert Rodriguez,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Laura Boyd of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jenetha G. Philbert of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John P. Collins, J.), entered on or about March 22, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated denial of defendant's motion, given defendant's criminal history, disciplinary record while incarcerated and failure to successfully complete drug treatment for drug abuse (*see People v Gonzalez*, 29 AD3d 400 [2006], *lv denied* 7 NY3d 867 [2006]).

Defendant also claims, and the People agree, that a DNA databank fee should not have been imposed at the time of the underlying conviction because the crime was committed prior to the effective date of the legislation providing for the

imposition of the fee. However, defendant neither appealed from the underlying judgment nor moved to set aside the sentence under CPL 440.20. Defendant has only appealed from an order denying resentencing under the Drug Law Reform Act (L 2009, ch 56). Defendant's resentencing motion raised the fee issue, but nothing in the Act provides for relief relating to an underlying judgment, except with respect to the prison term. Accordingly, the fee issue is not properly before us (*cf*. *People v Marchena*, 60 AD3d 508, 509 [2009])

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Abdus-Salaam, Román, JJ.

5535 Claudia Evart, Index 117760/04
Plaintiff-Appellant,

-against-

Park Avenue Chiropractics, P.C., et al.,
Defendants-Respondents.

_____

Daniel W. Isaacs, New York, for appellant.

Law Office of Stephen P. Haber, White Plains (Stephen P. Haber of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Nicholas Figueroa, J.), entered November 19, 2009, dismissing the complaint, and bringing up for review an order, (same court and Justice), entered on or about September 30, 2009, which granted defendants' motion to set aside the verdict, unanimously affirmed, without costs.

Plaintiff slipped and fell in her apartment, suffering a cervical disc protrusion and radiculopathy. Her physician referred her for treatment by a number of specialists, including defendant chiropractor, Nancy Jacobs. Plaintiff claims that, during the course of her treatment, defendant and a covering chiropractor, Dr. Marsillo, both performed a sudden maneuver, which caused her head to be pushed forcefully forward and to the

side, and that this event caused an exacerbation of her pre-existing injuries. The court submitted to the jury a series of special interrogatories in support of a general verdict. Initially, the jury found that Marsillo departed from good and accepted chiropractic care in his treatment of plaintiff but that such departure was not a substantial factor in the happening of plaintiff's injuries. The jury then found that Jacobs did not depart from the standard of care. Following the instructions on the verdict sheet, the jury did not consider the question of informed consent, and reported the verdict to the court. On plaintiff's motion, the court resubmitted the interrogatories to the jury and directed that they answer the questions on informed consent. The jury then found that Jacobs failed to disclose the risks of "the procedure," that a prudent patient would not have consented to the procedure following disclosure, and that plaintiff was injured as a result.

Resubmitting the lack of informed consent questions to the jury was error. "Unquestionably, it is impossible for a lack of informed consent to cause a physical injury" (*Flores v Flushing Hosp. and Med. Ctr.* 109 AD2d 198, 201 [1985]). It is hornbook law that "proximate cause must be proved in a lack of informed consent cause of action . . ." (*id.* at 201-202); or stated

another way, "it must be proven both that no fully informed reasonable person would consent to the treatment and that the plaintiff in fact suffered an injury which medically was caused by the treatment" (*id.*).

Once the jury found that while Marsillo departed from good and accepted care but that neither Marsillo's nor Jacob's care was a substantial factor in causing plaintiff's injury, the informed consent questions were foreclosed.

Assuming, arguendo, that the questions were properly before the jury, the result would not change. Plaintiff did not submit sufficient evidence in support of her lack of informed consent claim. In order to establish a prima facie claim based upon failure to procure a patient's informed consent to a procedure, a plaintiff, pursuant to CPLR 4401-a, must first adduce expert testimony establishing that the information disclosed to the patient about the risks inherent in the procedure was qualitatively insufficient (*see Rodriguez v New York City Health and Hosps. Corp.*, 50 AD3d 464 [2008]). The expert offering the opinion must be qualified in the area of medicine at issue (*see Gershberg v Wood-Smith*, 279 AD2d 424 [2001]). In this case, plaintiff failed to put forth any such testimony, either through her experts, or upon cross examination of defendants' witnesses.

Thus, the evidence was insufficient, as a matter of law, to support the jury's finding that a reasonably prudent person in plaintiff's position would not have proceeded with treatment had she been fully informed of the risks, benefits and alternatives (Public Health Law § 2805-d [3]; *see Thompson v Orner*, 36 AD3d 791 [2007]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Abdul-Salaam, JJ.

5536N- Ind. 3982/08
5536NA-
5536NB The People of the State of New York,
Plaintiff,

-against-

Louis Posner, et al.,
Defendants-Respondents,

New York City Police Department,
Non-Party-Movant-Appellant.

- - - - -

Michael Kessler,
Third-Party Respondent,

Joseph A. Bondy, et al.,
Third-Party Intervenors-Respondents.

_____

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for appellant.

Jonathan S. Gould, New York, for Posner respondents.

Roger J. Bernstein, New York, for Michael Kessler, respondent.

Joseph A. Bondy, New York, for Robert Fogelnest and Margaret Clemons, respondents, and respondent pro se.

_____

Order, Supreme Court, New York County (Michael J. Obus J.), entered on or about April 13, 2010, which, in an action concerning custody of seized funds, denied the motion of nonparty New York City Police Department (NYPD) to vacate prior orders,

same court and Justice, entered on or about February 18, 2010, directing the release of money from the seized funds to pay defendants' attorneys' fees, private investigator fees, accountant's fees, and living expenses, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered on or about April 13, 2010, which directed the NYPD to release funds to pay said fees accruing up to March 2010, unanimously dismissed, without costs, as subsumed in the appeal from the order denying the NYPD's motion to vacate.

The court had jurisdiction to decide the issue regarding the release of the seized funds (*see* CPL 690.55[1][a]; *Matter of Documents Seized Pursuant to Search Warrant*, 124 Misc 2d 897, 899 [1984]). The record belies NYPD's argument that it was not afforded a full and fair opportunity to be heard before the court directed the release of the subject funds. Furthermore, under the circumstances presented, the court properly exercised its equitable powers to order the release of the funds to pay

attorneys' and experts' fees (*id.*).

We have considered NYPD's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Abdus-Salaam, Román, JJ.

5538 In re Robert Jones, Ind. 50377/08
[M-2545 Petitioner,

-against-

Justice Daniel Conviser, et al.,
Respondents.

_____

Douglas G. Rankin, Brooklyn, for petitioner.

Eric T. Schneiderman, Attorney General, New York (Roberta L. Martin of counsel), for Hon. Daniel Conviser, respondent.

Cyrus R. Vance, Jr., District Attorney, New York (Rachel Ehrhardt of counsel), for Cyrus R. Vance, Jr., respondent.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: JULY 7, 2011

CLERK

Andrias, J.P., Sweeny, Catterson, Renwick, JJ.

4972- Index 112247/10
4973- 112249/10
4974 Lillian Roberts, etc., et al., 112294/10
Petitioners-Respondents,

-against-

Health and Hospitals Corporation, et al.,
Respondents-Appellants.

- - - - -

Honorable Daniel Dromm, etc., et al.,
Petitioner-Respondents,

-against-

Health and Hospitals Corporation,
Respondent-Appellant.

- - - - -

Sean Fitzpatrick, etc., et al.,
Petitioners-Respondents,

-against-

Health and Hospitals Corporation, et al.,
Respondents-Appellants.

_____

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for appellants.

Mary J. O'Connell, New York (Steven E. Sykes of counsel), for Lilian Roberts, Kyle Simmons, Trevor Moonsammy and Victor Maduro, respondents.

Broach & Stulberg, LLP, New York (Robert B. Stulberg of counsel), for Daniel Dromm, Karen E. Koslowitz, Julissa Ferreras and Frank Spencer, respondents.

Greenberg Burzichelli Greenberg P.C., Lake Success (Robert J. Burzichelli of counsel), for Sean Fitzpatrick, Rodney Downes, William Larosa and Bill Lecomples, respondents.

Orders and judgments (each one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered December 13, 2010, reversed, on the law, without costs, the injunctions vacated, the petitions denied and the proceedings brought pursuant to CPLR article 78 dismissed.

Opinion by Sweeny, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
John W. Sweeny, Jr.
James M. Catterson
Dianne T. Renwick, JJ.

4972-4973-4974

Index 112247/10
112249/10
112294/10

_____x

Lillian Roberts, etc., et al.,
Petitioners-Respondents,

-against-

Health and Hospitals Corporation, et al.,
Respondents-Appellants.

- - - - -

Honorable Daniel Dromm, etc., et al.,
Petitioner-Respondents,

-against-

Health and Hospitals Corporation,
Respondent-Appellant.

- - - - -

Sean Fitzpatrick, etc., et al.,
Petitioners-Respondents,

-against-

Health and Hospitals Corporation, et al.,
Respondents-Appellants.

_____x

Respondents appeal from the orders and judgments (each one paper) of the Supreme Court, New York County (Alice

Schlesinger, J.), entered December 13, 2010, which granted the petitions to annul the determination of respondent HHC to lay off carpenters, electricians, and laborers, respectively at their facilities.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr, Francis F. Caputo and Eamonn Foley of counsel), for appellants.

Mary J. O'Connell, New York (Steven E. Sykes and Aaron S. Amaral of counsel), for Lilian Roberts, Kyle Simmons, Trevor Moonsammy and Victor Maduro, respondents.

Broach & Stulberg, LLP, New York (Robert B. Stulberg and Michael H. Isaac of counsel), for Daniel Dromm, Karen E. Koslowitz, Julissa Ferreras and Frank Spencer, respondents.

Greenberg Burzichelli Greenberg P.C., Lake Success (Robert J. Burzichelli, Linda N. Keller and Genevieve E. Peeples of counsel), for Sean Fitzpatrick, Rodney Downes, William Larosa and Bill Lecomples, respondents.

SWEENY, J.

These consolidated appeals from three Article 78 proceedings once again raise the issue of the proper role of the judiciary in our coordinate branch system of government. Petitioners in each action seek to involve the courts in a decision-making process that lies squarely within the purview of the executive branch. While in appropriate circumstances, the courts may intervene to review such decisions, this power must be exercised sparingly (*Jones v Beame*, 45 NY2d 402, 406 [1978]). In these proceedings, for the reasons to be discussed, we decline to do so.

THE PARTIES

Respondent New York City Health and Hospitals Corporation (HHC) is a public benefit corporation formed by virtue of the provisions of McKinney's Unconsolidated Laws of NY § 7384 [HHC Act 84, as added by L1969, ch 1016.81 as amended]. The Legislature created HHC to address the need to provide "a system permitting legal, financial and managerial flexibility . . . for the provision and delivery of high quality, dignified and comprehensive care and treatment for the ill and infirm, particularly to those who can least afford such services" (McKinney's Unconsolidated Laws of NY § 7382 [HHC Act 827]).

HHC provides medical and treatment services to approximately

1.3 million New Yorkers annually through the operation of its 11 acute care hospitals, 4 skilled nursing facilities, 6 large diagnostic and treatment centers and more than 80 community-based clinics. It is administered by a board of directors appointed by the Mayor and City Council. It has a chief executive officer selected by the board "from persons other than themselves" who serves at the pleasure of the board (McKinney's Unconsolidated Laws of NY § 7384[1] [HHC Act 84(1) as amended]).

Petitioners consist of elected officials, labor union representatives and union members. These petitions are brought to revisit certain layoff decisions made by HHC which will be discussed more fully herein.

In *Dromm v HHC*, petitioners are: (1) Daniel Dromm, Karen E. Koslowitz and Julissa Ferreras, three members of the New York City Council representing districts in Queens; and (2) Frank Spencer, the Supervisor of the New York City District Council of Carpenters (the Carpenter's Union) representing, inter alia, carpenters and supervisor carpenters employed by HHC.

In *Fitzpatrick v HHC*, petitioners are: (1) Sean Fitzpatrick, the business representative of Local Union No. 3, I.B.E.W. (the Electricians Union); (2) the Electricians Union in its own right, which represents HHC's supervisor electricians, electricians, and electrician's helpers; (3) Rodney Downes, an HHC electrician

scheduled to be laid off; and (4) William LaRosa and Bill Lecomples, HHC electricians who were to retain their positions after the scheduled layoffs.

In *Roberts v HHC*, petitioners are: (1) Lillian Roberts, the Executive Director of District Council 37 (DC37), a confederation of 55 local labor unions; (2) Kyle Simmons, the President of Local 924, the DC37 affiliate representing HHC laborers; (3) Trevor Moonsammy, an HHC laborer scheduled to be laid off; and (4) Victor Maduro, an HHC laborer scheduled to be laid off from his present position and reassigned to his previous title of "Service Aide."

FACTS

The underlying facts are essentially not in dispute.

In early 2009, in response to city budget cuts and other financial issues affecting its operations, HHC undertook to restructure its organization with a goal of making it more cost efficient. As part of this effort, HHC formed a "Restructuring Steering Committee" consisting of executives and network leaders from within HHC. It also retained Deloitte Consulting (Deloitte) to conduct a study of HHC at every level and propose various options to be considered by the steering committee in deciding how best to restructure the corporation. Deloitte was given a

twofold mission: provide the steering committee with options to save approximately $1 billion while preserving HHC's main function of providing "patient care to all, regardless of ability to pay" and building upon HHC's "patient safety culture."

Deloitte spent nine months, including 2,000 pro bono hours, examining HHC's operations at all levels. It presented 100 options to the steering committee in a massive 1,000 page report describing the risks, mission impact and expected financial results of each option presented. The recommendation which underlies these proceedings called for the creation of "shared services operations and contracting out the management and/or provision of ancillary services" such as those provided by carpenters, electricians, laborers and plumbers. Included in this recommendation was the elimination of certain titles and the layoff of some ancillary, i.e., nonmedical employees. It was estimated that this recommendation, if fully implemented, would save HHC approximately $141 million.

In April 2010, the steering committee discussed all of Deloitte's recommendations, rejected a number of the proposed options and decided which ones to implement. The steering committee determined that HHC could eliminate certain trades positions, including carpenters, electricians, and laborers, while safely maintaining its facilities. This decision was made

after consultation with the facility managers affected. In May 2010, HHC released a report announcing the steering committee's final cost-reduction decisions. Rather than reduce services or shutter facilities, HHC ultimately decided, inter alia, to eliminate, effective September 17, 2010, 45 of 136 carpenter positions, 45 of 156 electrician positions and 54 of 104 laborer positions, among others. The number of employees subject to these layoffs was lower than those recommended by Deloitte.

On September 15 and 16, 2010, in response to the proposed layoffs, the three instant petitions were filed.

THE PETITIONS

The *Dromm* petitioners seek an order pursuant to CPLR 6301, 7803 and 7805, and Public Health Law (PHL) §2801-c, preliminarily and permanently enjoining HHC from abolishing one-third of its carpentry staff. Petitioners argue that the decision to abolish these positions violates McKinney's Unconsolidated Laws of NY §§ 7382 and 7385(7) (HHC Act 75[7], as amended), which require HHC to operate, manage, superintend, control, repair, maintain and otherwise keep up its health facilities. They also claim violations of PHL §§ 2800 and 2803, as well as specified Department of Health Regulations promulgated thereunder at 10 NYCRR 405.24, 702.1, 702.2, 702.3, 711.2 and 711.4. These

regulations require HHC to maintain its health facilities in a manner so as to assure a safe and suitable environment for patients. Petitioners argue that HHC's decision to reduce its maintenance staff will create an unsafe condition for patients and staff members who remain employed at the affected facilities. It is claimed that HHC's decision demonstrates a failure to perform a duty enjoined upon it by law - namely, the maintenance of its facilities in a safe condition - and thus brings the petition within the ambit of CPLR 7803(1) and (3).

The *Fitzpatrick* petitioners claim that HHC's scheduled layoffs would threaten the safety of electricians who retained their jobs. They seek declaratory and injunctive relief on substantially the same grounds as alleged in *Dromm*. Additionally, they claim that the scheduled layoffs would violate the Merit and Fitness clause of the New York Constitution, article V, § 6, because HHC allegedly planned to hire private contractors to perform the work of laid-off HHC electricians. They also claim that HHC's layoff procedures violated its Personnel Rules and Regulations, Rule 7.6.3.

The *Roberts* petitioners assert claims and request relief that are substantially similar to those in *Dromm*.

The trial court issued temporary restraining orders in the three proceedings on September 15 and 17, 2010, prohibiting the

layoffs from going into effect. To date, no layoffs have occurred.

On October 8, 2010, the court issued an interim order holding that all petitioners had standing to pursue their claims against HHC. It then scheduled a consolidated hearing on the merits of petitioners' claims and to determine whether it should vacate the TROs or convert them into preliminary and permanent injunctions.

At the conclusion of the hearings, the court granted the petitions in their entirety. The court found, inter alia, that HHC's layoff decision was arbitrary and capricious; that HHC failed to employ a sound methodology designed to gather and evaluate all the relevant facts and assess the potential impact of the proposed layoffs on the health and safety of the patients, staff, and remaining tradespeople; that Deloitte used a flawed analysis in arriving at its layoff recommendations; that HHC did not conduct appropriate planning to minimize the impact of the proposed staff reductions; that "[t]he flaws in HHC's decision-making process . . . are numerous and profound"; and that HHC did not develop an adequate health and safety plan.

The court remanded the matter for further evaluation by HHC consistent with the terms of its decision.

We now reverse.

STANDING

We begin with a review of the applicable Public Health Law provisions.

PHL § 2800, entitled "Declaration of policy and statement of purpose," states in pertinent part:

> "Hospital and related services including health-related service of the highest quality, efficiently provided and properly utilized at reasonable cost, are of vital concern to the public health . . . [A]ll public and private institutions, whether state, county, municipal, incorporated or not incorporated, serving principally as facilities for the . . . rendering of health-related service shall be subject to the provisions of this article."

PHL § 2801-c, entitled "Injunctions" states:

> "The supreme court may enjoin violations or threatened violations of any provisions of this article; and it may enjoin violations of the regulations of the department adopted thereunder."

The Health Department's Public Health Council adopts regulations, subject to the Commissioner's approval, to effectuate the provisions and purposes of this article (PHL § 2803[2][a]). The petitioners claim that these regulations, specifically found at 10 NYCRR 405.1 *et seq.* and 701.1 *et seq.*, were violated.

Whether a person seeking relief from a court is a proper party to request an adjudication "is an aspect of justiciability

which must be considered at the outset of any litigation" (*Matter of Dairylea Coop. Inc. v Walkley*, 38 NY2d 6, 9 [1975]). Standing is thus a threshold determination that allows a litigant access to the courts to adjudicate the merits of a particular dispute that otherwise satisfies the other justiciability criteria (*see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]).

In *New York State Assn. of Nurse Anesthetists v Novello* (2 NY3d 207, 211 [2004]), the Court of Appeals restated the well established, two-part test for determining standing to challenge governmental action. The first prong of this test requires that a petitioner must demonstrate "injury in fact," meaning that he or she "will actually be harmed by the challenged administrative action." The claimed injury, of course, "must be more than conjectural." Moreover, a party must show that the injury suffered is personal to the party, i.e., "distinct from that of the general public" (*Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579, 587 [1998]; *Matter of McAllan v New York State Dept. of Health*, 60 AD3d 464, 464 [2009]). The second prong of the test requires that the injury "must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted" (*Novello*, 2 NY3d at 211). This "zone of

interest" test permits the court to ascertain the petitioner's status without reaching the merits of the litigation. It also ensures that a group or individual "whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes" (*Society of Plastics Indus.*, 77 NY2d at 774). Here, petitioners fail to satisfy both the "injury in fact" and "zone of interest" prongs of the test to establish standing.

Viewed in its best light, petitioners' claim that the scheduled layoffs would leave HHC so short-staffed that HHC facilities would inevitably violate Public Health Law article 28, thus exposing them to "imminent" risk from "smoke, fire, bacterial, toxic and structural hazards," is speculative. Each construction trade (carpenters, electricians and laborers) maintained that the various facilities operated by HHC were already understaffed, as evidenced by the overtime worked and open repair tickets. HHC countered that, in many cases, the work performed by these trades was done after hours so as to minimize patient inconvenience, thus necessitating overtime. It also noted that many of the open repair tickets submitted at the hearing had in fact been closed. In addition, the construction trades alleged that work performed by outside contractors was

inferior, although there was no evidence submitted to support this claim. Taken as a whole, however, petitioners' claims assert only threatened, not actual, violations of the Public Health Law. They point to no specific violation of any building code provision which will, as a result of these layoffs, actually occur and which will cause actual injury to them. Rather, petitioners approached the proposed layoffs globally, i.e., they essentially claim that the proposed layoffs would create the conditions for violations to occur at some unspecified future time. This is far too speculative and hypothetical to even approach the "injury-in-fact" requirement (*see Novello,* 2 NY3d at 214-215; *see also Rudder v Pataki*, 93 NY2d 273, 279 [1999] ["tenuous" and "ephemeral" harm is "insufficient to trigger judicial intervention"]). Additionally, this asserted "injury" is neither separate nor distinct from that of the public at large, including the numerous New York City residents who utilize HHC facilities and would presumably be affected by the purported deficiencies in these allegedly unsafe and understaffed facilities (*see Matter of McAllan,* 60 AD3d at 464).

Nor do petitioners find themselves within the zone of interests or concerns sought to be promoted or protected by the statutory provisions under which HHC acted. Indeed, the regulations cited by petitioners that HHC allegedly violated

mostly provide for the benefit and protection of the patients at hospitals and other medical facilities (*see* 10 NYCRR 405.24 ["The hospital shall be operated and maintained to ensure the safety of patients"]; 702.1[d][1] [hospitals must operate ventilation, heating and others systems to "provide for patient or resident health and comfort"]; 702.1[e][3] [buildings shall be maintained free of nuisances that may adversely affect patient health]; 711.2 [All medical facilities shall provide for proper, safe and efficient patient and resident care]). Any benefits the HHC staff derives from those regulations are incidental. While petitioners also reference safety and maintenance regulations that mention neither patients nor staff (10 NYCRR 405.24[c][2] [a written preventive maintenance program shall be established and implemented to insure all buildings and equipment are operated and maintained in a safe and sanitary condition]; 702.2[a] [the entire facility shall be maintained in good repair]; 702.3[a] [buildings shall be maintained so as to prevent fire and other hazards to personal safety]; 711.4[b] [general construction standards]), this merely demonstrates that HHC staff benefits incidentally from those regulations, not that the regulations were promulgated for their benefit. Such incidental benefit is insufficient to confer standing upon petitioners.

Moreover, to the extent that certain regulations cited by

petitioners relating to hospital emergency policies, practices, plans and procedures do mention staff and personnel (*see* 10 NYCRR 405.3[b][9],[10]; 405.8[b][2]; 405.25[b]; and 702.3[e]), the claimed violation of these regulations remains wholly theoretical and unsubstantiated. As noted above, what petitioners essentially argue is that these layoffs would create the conditions that would lead to some future, unspecified violations of health laws and regulations. Their injuries are potential, not actual. Petitioners fail to demonstrate how their vague and nebulous claims of possible injury from the alleged potential violations of these regulations relate to PHL article 28's goals of "cost containment and the promotion of efficiency in health care planning" (*Arnot-Ogden Mem. Hosp. v Guthrie Clinic*, 122 AD2d 413, 414 [1986], *lv denied* 68 NY2d 612 [1986]). As a result, petitioners have failed to state a claim for entitlement to injunctive relief under PHL § 2801-c, as petitioners can only claim *threatened*, not *actual* violations of the statute.

Even if we assume arguendo, that the claims of the City Council petitioners in *Dromm* were not speculative or common with the public at large, those petitioners still lack standing to bring this petition. The trial court's reliance on *Matter of Powis v Giuliani* (216 AD2d 107 [1995]) and *Matter of Graziano v County of Albany* (3 NY3d 475 [2004]) is misplaced. *Powis* did not

directly address the issue of whether an elected official had standing to challenge the Fire Department's decision to eliminate street fire alarm boxes. In fact, it was silent on this issue. *Graziano* involved an appointed, not elected official and does not specifically stand for the proposition that elected officials have standing to assert claims on behalf of their constituents. Of note is the fact that the Court of Appeals stated that an election commissioner "performs two distinct statutory functions -he assists his cocommissioner in the administration of the Board and he safeguards the equal representation rights of his party" (3 NY3d at 480). The Court denied standing to the petitioner election commissioner on his claims on behalf of the county Board of Elections, i.e., in his governmental capacity. It found however, that he had standing "in the language of the Constitution and the Election Law . . . in [his] unique role as guardian of the rights of his party and . . . from the constitutional and statutory requirement of equal representation" (*id.*). This is a far different situation than that presented here. We have previously held that legislator petitioners specifically have no standing because they "may not raise legal grievances on behalf of others" (*Urban Justice Ctr. v Pataki*, 38 AD3d 20, 27 [2006], *appeal dismissed, lv denied* 8 NY3d 958 [2007] citing *Society of Plastics Indus.*, 77 NY2d at 773).

Finally, contrary to the *Fitzpatrick* and *Roberts* petitioners' argument that HHC's layoff determination violated McKinney's Unconsolidated Laws of NY §§ 7382 and 7385(7), we note that neither provision imposes enforceable legal duties upon HHC (*see Matter of Hamburg v McBarnette*, 83 NY2d 726, 733 [1994]; *McAllan v Marcos*, 262 AD2d 192, 192-193 [1999], *appeal dismissed* 94 NY2d 791 [1999], *lv dismissed in part, denied in part* 95 NY2d 789 [2000]). In any event, PHL § 2801-c authorizes injunctive relief only for violations of "any provisions" of the Public Health Law or "the regulations of the department adopted thereunder," not for claimed violations of the Unconsolidated Laws.

Thus, the trial court should have dismissed the petitions in toto, as petitioners lacked standing and failed to state a claim for injunctive relief under the Public Health Law.

JUSTICIABILITY

The question of whether the scheduled layoffs would leave HHC with a sufficient staff to satisfy its statutory obligations presents a nonjusticiable controversy.

"One of the fundamental principles of government underlying our Federal Constitution is the distribution of governmental power into three branches - - the executive, legislative and

judicial - - to prevent too strong a concentration of authority in one person or body" (*Under 21, Catholic Home Bur. for Dependent Children v City of New York*, 65 NY2d 344, 355 [1985]). The principle of separation of powers has long been recognized as "included by implication in the pattern of government adopted by the State of New York" (*id.* at 355-356). "While the doctrine of separation of powers does not require the maintenance of three airtight departments of government, it does require that no one branch be allowed to arrogate unto itself powers residing entirely in another branch" (*id.* at 356 [internal quotation marks and citations omitted]; *see also Clark v Cuomo*, 66 NY2d 185, 189 [1985]).

The doctrine of justiciability is an "untidy" concept that "embraces the constitutional doctrine of separation of powers and refers, in the broad sense, to matters resolvable by the judicial branch of government as opposed to the executive or legislative branches or their extensions" (*Jiggetts v Grinker*, 75 NY2d 411, 415 [1990][inner quotation marks omitted]). Although much has been written on this subject, it remains "a concept of uncertain meaning and scope" (*Flast v Cohen*, 392 US 83, 95 [1968]), one that is "more than an intuition but less than a rigorous and explicit theory" (*Allen v Wright*, 468 US 737, 750 [1984]). Cases that have presented nonjusticiable controversies involve

political questions, advisory opinions, moot issues and those where there is no standing to maintain an action (*Flast*, 392 US at 95).

Part of the uncertainty in the doctrine of justiciability arises from the fact that the doctrine "has become a blend of constitutional requirements and policy considerations" (392 US at 97). Moreover, policy limitations are "not always clearly distinguished from the constitutional limitation" (*see Barrows v Jackson*, 346 US 249, 255 [1953]). The courts have the responsibility of determining whether a matter falls within the purview of another branch of government, or whether the action of that branch exceeds its constitutional authority (*Baker v Carr,* 369 US 186, 211 [1962]; *see also Cohen v State of New York*, 94 NY2d 1, 11 [1999]). However, as part of the tripartite constitutional structure, courts must use this power prudentially so as to not encroach on the power of a coequal branch. Put another way, "[c]ourts at all levels are enjoined not to substitute their judgment for that of the coordinate branch of government to whom such judgment has been, in the scheme of a dividend [*sic*] government, primarily entrusted" (16A Am Jur 2d, Constitutional Law §§ 267, 268).[1]

[1] This has been a basic restriction on judicial power since the earliest days of the Republic. *see* Alexander Hamilton, *The*

Critics of the doctrine have argued that justiciability undermines the separation of powers doctrine because it restricts or even bars the exercise of judicial review, the main barrier which prevents unconstitutional action by the political branches. (*See* for example Erwin Chemerinsky, INTERPRETING THE CONSTITUTION, at 1-24, 86-97 [1987]; Martin H. Redish, THE FEDERAL COURTS IN THE POLITICAL ORDER, at 4-6, 75-100 [1991]). Its defenders, on the other hand, argue that justiciability preserves the judiciary's circumscribed role in our system of tripartite government (*see for example* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 17 Suffolk U L Rev 881, 890-899 [1983]).

While the doctrine of justiciability has evolved with the passage of time[2], "[t]here is one recurrent theme: the court as a policy matter, even apart from principles of subject matter

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Federalist No.78, at 525- 526.

[2] For an excellent review of the origins, evolution and suggestions for the future of the doctrine of justiciability, see Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L Rev 393 [1996]. Professor Pushaw argues that the twentieth Century saw an erosion of the traditional principles of the doctrine of justiciability laid down by the Founders, particularly the Federalists. This in turn has created the uncertainty in "meaning and scope" of the doctrine as the Court in *Flast* noted (392 US at 95). He argues that a return to the Federalist principles, adapted to modern jurisprudence, will bring more clarity to the doctrine of justiciability.

jurisdiction, will abstain from venturing into areas if it is ill-equipped to undertake the responsibility and other branches are far more suited to the task" (*Jones*, 45 NY2d at 408-409). This is particularly true in those cases that involve political questions, which involve "those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches" (16A Am Jur 2d, Constitutional Law §268). "The nonjusticiability of a political question is primarily a function of the separation of powers," which requires a case-by-case analysis (*Baker,* 392 US at 210).

It is axiomatic that each branch of government "should be free from interference, in the lawful discharge of duties expressly conferred, by either of the other branches" (*Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo*, 64 NY2d 233, 239 [1984]). "The lawful acts of executive branch officials, performed in satisfaction of responsibilities conferred by law, involve questions of judgment, allocation of resources and ordering of priorities, which are generally not subject to judicial review" (*id.*; *see Matter of Abrams v New York City Tr. Auth.*, 39 NY2d 990, 992 [1976]; *see also Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSME, AFL-CIO v County of Erie*, 43 AD3d 1341,

1342 [2007]). This general rule is, however, subject to the exception that a court may "prevent a member of the executive branch from acting ultra vires, in bad faith, or arbitrarily" (16A Am Jur 2d, Constitutional Law § 272).

The need for deference on the part of the judiciary for the other two branches of government, where appropriate, is an important concept that has long been recognized, particularly since the courts are the ultimate arbiters of the State Constitution (*see e.g. Cohen v State of New York*, 94 NY2d 1, 11 [1999]). The doctrine of separation of powers generally will preclude a court from intruding upon "'the policy-making and discretionary decisions that are reserved to the legislative and executive branches'" (*Campaign for Fiscal Equity, Inc. v State of New York*, 8 NY3d 14, 28 [2006], quoting *Klostermann v Cuomo*, 61 NY2d 525, 541 [1984]; *see also Matter of Montano v County Legislature of County of Suffolk*, 70 AD2d 203, 210 [2009]).

At the same time, however, "it is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them" (*Campaign for Fiscal Equity, Inc. v State of New York*, 100 NY2d 893, 925 [2003]). The competing obligations between the judiciary's responsibility to safeguard rights and the necessary deference to be paid to the policies of the other two branches of

government creates a tension that must remain in balance. "While it is within the power of the judiciary to declare the vested rights of a specifically protected class of individuals, in a fashion recognized by statute, the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government" *(Matter of New York State Inspection, Sec. & Law Enforcement Employees v Cuomo*, 64 NY2d at 239-240 [internal citation omitted]). Simply put, "[w]hen [the courts] review the acts of the Legislature and the Executive, we do so to protect rights, not to make policy" (*Campaign for Fiscal Equity,* 8 NY3d at 28; *see also Matter of Maron v Silver*, 14 NY3d 230, 261 [2010]).

Inasmuch as the Legislature saw fit to give HHC the discretion to determine the number of nonmanagerial employees necessary to carry out its mission (McKinney's Unconsolidated Laws of NY § 7385[12]; § 7382), HHC's decisions regarding staffing levels are beyond judicial review. Petitioners here have failed to identify any provision of the Public Health Law, Unconsolidated Laws, or any regulations requiring HHC to employ maintenance staff at a specific level or to determine maintenance staff levels in accordance with a particular standard or formula. Statutory requirements that public agencies maintain their facilities in a safe and sanitary condition do not give rise to

judicially enforceable rights to employment of maintenance staff at any given level (*see Delgado v New York City Hous. Auth.*, 66 AD3d 607, 608 [2009]).

Financial and budgetary considerations presented HHC with a Hobson's choice: either reduce its expenses by various means, including layoffs of some staff, or violate its statutory mandate to provide cost-efficient medical services by reducing or shuttering medical services and facilities. The Legislature, by statutory provision, saw fit to put these types of decisions squarely within HHC's executive function (McKinney's Uncons. Laws of NY § 7382). By annulling HHC's layoff determination and mandating that it continue to employ workers identified for layoffs until it came up with a plan which passed judicial scrutiny, the court improperly inserted itself into executive branch decision making by interfering with HHC's exercise of its statutory authority.

Petitioners' claims that HHC's decision to reduce maintenance staff would result in the creation of an unsafe workplace does not salvage their petitions. In addition to being far too speculative to rise to the level of an injury in fact, those claims clearly present a nonjusticiable controversy. "The statutory right to a safe workplace may not be enforced by means of a remedy at law which would require the judiciary to preempt

the exercise of discretion by the executive branch of government" (*Matter of New York State Inspection, Sec. & Law Enforcement Empls.*, 64 NY2d at 237; *McKechnie v New York City Tr. Police Dept. of N.Y. City Tr. Auth.*, 130 AD2d 466, 468 [1987]).

Neither the petitioners nor the courts should be permitted to substitute their judgment for the discretionary management of public business by public officials, as neither have been lawfully charged with that responsibility (*see Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 232 [2007]; Matter *of Abrams*, 39 NY2d at 992). Petitioners, "however sincerely motivated, may not interpose themselves and the courts into the management and operation of public enterprises" (*Jones*, 45 NY2d at 407 [internal quotation marks omitted]).

HHC'S DECISION WAS NOT ARBITRARY AND CAPRICIOUS

We also note that, even assuming, arguendo, that petitioners had standing, HHC's layoff decision was not arbitrary and capricious and was founded on a rational basis *(see* CPLR 7803[3]).

Initially, the court improperly utilized a "substantial evidence" test in determining that HHC's methodology in determining its layoff policy was unsound. There was no

administrative hearing held or required prior to HHC's determination, and thus, application of the "substantial evidence" test was misplaced (*see* CPLR 7803[4]; *cf. Matter of Council of Trade Waste Assns. v City of New York*, 179 AD2d 413 [1992], *lv denied* 79 NY2d 755 [1992]). Indeed, the record before us clearly shows that HHC's layoff decision was rational in light of the imperative to reduce costs in conjunction with its mandate to provide medical services to all. The undisputed facts show that HHC took its massive restructuring effort seriously, as evidenced by the creation of a high level steering committee, and retention of Deloitte's services as an outside consultant to assist in a review of all of its current operations. Its instructions to Deloitte were to prepare cost-cutting/revenue-enhancing options consistent with HHC's mission of providing medical services to all, regardless of ability to pay. After a nine-month review of HHC's operations, Deloitte provided the steering committee with a voluminous report detailing 100 cost-cutting options as well as presenting the risks and mission impact of each. The committee reviewed those recommendations and selected 39, including the option of laying off trades workers rather than medical staff or closing clinics or other facilities. It rejected Deloitte's option of eliminating 14 outpatient clinics and four long-term care facilities, as well as the option

of closing or repurposing hospitals. Indeed, the steering committee demonstrated its thoughtful review of those options by, inter alia, reducing the targeted maintenance savings to 30 percent of the potential $160 million Deloitte had recommended. The steering committee decided to layoff 293 of HHC's trades staff, rather than the 421 recommended by Deloitte. The network leaders presented that proposal to HHC's medical facility managers who provided feedback to the steering committee based upon their expert knowledge of facility conditions. In arriving at its layoff decision, the steering committee specifically took into account the fact that any HHC facility may obtain additional trades workers, should the need arise, by borrowing them from other HHC facilities, utilizing an HHC requirements contract, or, as a last resort, invoking emergency contracting procedures.

The court, in rejecting HHC's layoff decision, relied heavily on petitioners' expert, Dr. John Shershow, who was critical of the methodology used by Deloitte in determining staffing levels. He opined that a different methodology, utilizing data from past inspections, should have been utilized in determining proper staffing levels at each HHC facility. When the expert was asked on cross-examination by HHC's counsel as to his opinion of HHC's decision-making methodology, the court improperly sustained petitioners' objection, ruling that that the

effect of HHC's decision, not how it came to those decisions, was at issue.

The court improperly rejected HHC's layoff decision as methodologically unsound. In doing so, the court ignored the fact that there was no evidence, statutory, regulatory or otherwise that mandated HHC to utilize any particular methodology in making its staffing determination. Simply put, the court disagreed with the manner in which HHC arrived at its decision and therefore rejected the result. However, while judicial review must be meaningful, the courts may not substitute their judgment for that of the agency, "for it is not their role to weigh the desirability of any action or to choose among alternatives" (*Akpan v Koch*, 75 NY2d 561, 570 [1990] [internal quotation marks omitted]).

There is nothing in this record which remotely demonstrates that HHC arrived at its decisions in bad faith or without adequate facts or deliberation. In fact, the record demonstrates exactly the opposite. Since HHC's staffing determination had a rational basis, we find no reason to disturb it (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]; *Matter of Riverkeeper, Inc.*, 9 NY3d at 232).

We have considered the petitioners' remaining arguments and

find them to be unpersuasive.

Accordingly, the orders and judgments (each one paper) of the Supreme Court, New York County (Alice Schlesinger, J.), entered December 13, 2010, which granted the petitions to annul the determination of respondent HHC to lay off carpenters, electricians, and laborers, respectively, at their facilities, should be reversed, on the law, without costs, the injunctions vacated, the petitions denied and the proceedings brought pursuant to CPLR article 78 dismissed.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 7, 2011

CLERK